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Supreme Court of the United States

OCTOBER TERM, 1951

No. 744

THE YOUNGSTOWN SHEET AND TUBE COMPANY,
ET AL., PETITIONERS,

vs.

CHARLES SAWYER

No. 745

CHARLES S. SAWYER, SECRETARY OF COMMERCE,
PETITIONER,

vs.

THE YOUNGSTOWN SHEET AND TUBE COMPANY,
ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED MAY 2, 1952

CERTIORARI GRANTED MAY 3, 1952

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INDEX

	Original	Print
Record from U.S.D.C., District of Columbia in Youngstown Sheet and Tube Co. Case No. 1635-52		
Complaint for injunction and for a declaratory judgment	1	1
Executive Order	8	6
Motion for preliminary injunction	16	13
Memorandum in support of motion	17	13
Affidavit of Herman J. Spoerer	18	14
Affidavit of Walter E. Watson	21	16
Opposition to motion for a preliminary injunction	25	19
Executive Order (Copy) (Omitted in printing)	28	
Telegram from Charles Sawyer	38	21
Order No. 1	40	22
Affidavit of Robert A. Lovett	46	27

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 5, 1952

Record from U.S.D.C., District of Columbia in Youngstown
Sheet and Tube Co. Case No. 1635-52—Continued

Opposition to motion for a preliminary injunction—
Continued

	Original	Print
Affidavit of Gordon Dean	51	31
Affidavit of Manly Fleischmann	53	33
Affidavit of Henry H. Fowler	55	34
Affidavit of Oscar L. Chapman	61	39
Affidavit of Jess Larson	69	44
Affidavit of Homer C. King	72	46
Affidavit of Charles Sawyer	75	49
Affidavit of Harry Weiss	86	59
Letter dated December 22, 1951 from the President to Nathan P. Feinsinger (Omitted in printing)	441	
Statement by the President, December 22, 1951 (Omitted in printing)	444	
Letter dated December 24, 1951 William J. Hopkins, Executive Clerk, the White House, to Nathan P. Feinsinger with attachments (Omitted in printing)	446	
Letter dated December 29, 1951 William D. Hassett, Secretary to the President to Nathan P. Feinsinger with attachment (Omitted in printing)	466	
Panel Report No. D-18-C March 13, 1952 (Omitted in printing)	521	
Report and Recommendations of the Wage Stabilization Board, March 20, 1952 (Omitted in printing)	470	
Affidavit of Nathan P. Feinsinger	89	62
Opinion, Pine, J.	232	63
Preliminary injunction	246	76
Notice of appeal	248	77
Application for stay of the order granting preliminary injunction	249	78
Designation of record (Omitted in printing)	251	
Order to transmit original record (Omitted in printing)	252	
Order denying motion for stay	257	79
Preliminary injunction (Omitted in printing)	260	
Notice of appeal (Omitted in printing)	262	
Record in United States Steel Company Case No. 1625-52		
Complaint for declaratory judgment and injunctive relief	94	80
Exhibit A. Telegram from Charles Sawyer (Copy) (Omitted in printing)	106	
Exhibit B. Order No. 1 (Copy) (Omitted in printing)	108	
Exhibit C. Executive Order (Copy) (Omitted in printing)	115	

Record in United States Steel Company Case No. 1625-52—

Continued	Original	Print
Motion for preliminary injunction	122	38
Points and authorities in support of motion	124	89
Amendment No. 1 to complaint	126	90
Affidavit of Wilbur L. Lohrentz	128	91
Affidavit of Lewis M. Parsons	137	96
Affidavit of John A. Stephens	143	99
Opposition to motion for a preliminary injunction	160	113
Executive Order (Copy) (Omitted in printing)	163	
Telegram from Charles Sawyer (Copy) (Omitted in printing)	173	
Order No. 1 (Copy) (Omitted in printing)	175	
Affidavits in support (Copies) (Omitted in printing)	181	
Proofs of service (Omitted in printing)	226	
Motion to withdraw verbal amendment and to proceed on the basis of motion for preliminary injunction—granted	229	115
Record in Bethlehem Steel Company et al. Case #1549-52	869	116
Complaint for declaratory judgment and injunctive relief	869	116
Exhibit A. Executive Order (Copy) (Omitted in printing)	878a	
Affidavit of R. E. McMath	879	123
Points and authorities in support of motion for temporary restraining order (Omitted in printing)	886	
Motion for a temporary restraining order and order to show cause	901	127
Order denying motion for temporary restraining order	903	128
Proof of service (Omitted in printing)	904	
Motion for preliminary injunction	905	128
Points and authorities in support of motion (Omitted in printing)	907	
Proof of service (Omitted in printing)	908	
Affidavit of Bruce Bromley	909	130
Points and authorities in support of motion (Omitted in printing)	916	
Opposition to motion for a preliminary injunction, attachments, and affidavits in support (Copies) (Omitted in printing)	940	
Application for stay of the order granting preliminary injunction (Omitted in Printing)	943	
Designation of record (Omitted in printing)	945	
Order to transmit original record (Omitted in printing)	946	
Preliminary injunction (Omitted in printing)	947	
Notice of appeal (Omitted in printing)	949	
Record in Jones & Laughlin Steel Corporation Case #1581-52	827	
Complaint for injunction and for a declaratory judgment and other relief	827	134

Record in Jones & Laughlin Steel Corporation Case
#1581-52—Continued

Complaint for injunction and for a declaratory judgment and other relief—Continued

	Original	Print
Exhibit A. Executive Order (Copy) (Omitted in printing)	827a	
Exhibit B. Order No. 1 (Copy) (Omitted in printing)	827b	
Exhibit C. Telegram from Charles Sawyer (Copy) (Omitted in printing)	827c	

Summons and service (Omitted in printing)	834	
---	-----	--

Affidavit of William R. Elliott	856	140
---	-----	-----

Motion for temporary restraining order and preliminary injunction	868A	143
---	------	-----

Opposition to motion for a preliminary injunction, attachments, and affidavits in support (Copies) (Omitted in printing)	859	
--	-----	--

Application for stay of the order granting preliminary injunction (Omitted in printing)	862	
---	-----	--

Designation of record (Omitted in printing)	864	
---	-----	--

Order to transmit original record (Omitted in printing)	865	
---	-----	--

Preliminary injunction (Omitted in printing)	866	
--	-----	--

Notice of appeal (Omitted in printing)	868	
--	-----	--

Record in Armet Steel Corporation et al. Case #1700-52	950	
--	-----	--

Complaint for declaratory judgment, permanent injunction and other relief	950	
---	-----	--

Exhibit A. Telegram from Charles Sawyer (Copy) (Omitted in printing)	964	
--	-----	--

Exhibit B. Order No. 1 (Copy) (Omitted in printing)	965a	
---	------	--

Exhibit C. Executive Order (Copy) (Omitted in printing)	965b	
---	------	--

Motion for preliminary injunction	1476A	
---	-------	--

Points and authorities in support of motion (Omitted in printing)	966	
---	-----	--

Opposition to motion for a preliminary injunction, attachments, and affidavits in support (Copies) (Omitted in printing)	999	
--	-----	--

Application for stay of the order granting preliminary injunction (Omitted in printing)	1002	
---	------	--

Designation of record (Omitted in printing)	1004	
---	------	--

Order to transmit original record (Omitted in printing)	1005	
---	------	--

Preliminary injunction (Omitted in printing)	1008	
--	------	--

Notice of appeal (Omitted in printing)	1010	
--	------	--

Record in Republic Steel Corporation Case #1647-52	684	
--	-----	--

Complaint for injunction and for a declaratory judgment and other relief	684	154
--	-----	-----

Summons and service (Omitted in printing)	691	
---	-----	--

INDEX

V

Record in Republic Steel Corporation Case #1647-52—

Continued

	Original	Print
Affidavit of Eugene Magee	692	159
Affidavit of John M. Schlendorf	696	163
Executive Order (Copy) (Omitted in printing)	700a	
Motion for preliminary injunction	725	166
Opposition to motion for a preliminary injunction, attachments, and affidavits in support (Copies) (Omitted in printing)	701	
Application for stay of the order granting preliminary injunction (Omitted in printing)	704	
Designation of record (Omitted in printing)	706	
Order to transmit original record (Omitted in printing)	707	
Preliminary injunction (Omitted in printing)	708	
Notice of appeal (Omitted in printing)	710	
Record in E. J. Lavino and Company Case #1732-52	1011	
Complaint for declaratory judgment and injunctive relief	1011	167
Exhibit A. Executive Order (Copy) (Omitted in printing)	1025a	
Exhibit B. Order No. 1 (Copy) (Omitted in printing)	1025b	
Exhibit C. Notice of taking possession by United States of America	1025e	178
Exhibit D. Telegram from Charles Sawyer (Copy) (Omitted in printing)	1025d	
Exhibit E. Letter dated April 10, 1952, E. J. Lavino and Company to Charles Sawyer	1026	179
Exhibit F. Telegram dated April 12, 1952, Charles Sawyer to E. J. Lavino and Co.	1027	183
Exhibit G. Day letter dated April 14, 1952, E. J. Lavino and Company to Charles Sawyer	1028	180
Motion for preliminary injunction	1032	184
Points and authorities in support of motion	1033	185
Affidavit of Andrew Leith	1039	192
Affidavit of Charles Sawyer	1048	199
Opposition to motion for a preliminary injunction, attachments, and affidavits in support (Copies) (Omitted in printing)	1050	
Affidavit of George B. Gold	1124	200
Exhibit A. Tabulation of the payroll ending April 13, 1952 for the plants	1128	203
Application for stay of the order granting preliminary injunction (Omitted in printing)	1139	
Designation of record (Omitted in printing)	1141	
Order to transmit original record (Omitted in printing)	1142	
Preliminary injunction (Omitted in printing)	1143	
Notice of appeal (Omitted in printing)	1144	

Record in Youngstown Sheet and Tube Co. Case #1550-52	419	
Complaint for injunction and for a declaratory judgment	(Omitted in printing)	419
Exhibit A. Executive Order (Omitted in printing)		425a
Summons and service	(Omitted in printing)	426
Affidavit of Walter E. Watson (Omitted in printing)		427
Motion for temporary restraining order		431
Motion for preliminary injunction (Omitted in printing)		432
Memorandum in support of motion (Omitted in printing)		433
Statement by Secretary of Commerce, Charles Sawyer following the President's Directive (Omitted in printing)		434
Telegram from Charles Sawyer (Omitted in printing)		434a
Telegram dated April 8, 1952 Charles Sawyer to Philip Murray	(Omitted in printing)	435
Order No. 1	(Omitted in printing)	435a
Notice of taking of possession by United States of America	(Omitted in printing)	436
Order denying application for a temporary restraining order		437
Opposition to motion for a preliminary injunction, attachments and affidavits in support (Copies)	(Omitted in printing)	438
Affidavit of Herman J. Spoerer (Omitted in printing)		660
Notice of special appearance (Omitted in printing)		663
Supplemental memorandum of defendant (Omitted in printing)		665
Motion to dismiss or, in lieu thereof, to quash the return of service of summons (Omitted in printing)		667
Supplemental memorandum for the defendant	(Omitted in printing)	674
Application for stay of the order granting preliminary injunction	(Omitted in printing)	677
Designation of record	(Omitted in printing)	679
Order to transmit original record (Omitted in printing)		680
Preliminary injunction	(Omitted in printing)	681
Notice of appeal	(Omitted in printing)	683
Record in United States Steel Company Case #1624-52		263
Complaint for declaratory judgment and injunctive relief	(Omitted in printing)	263
Exhibit A. Telegram from Charles Sawyer (Copy)	(Omitted in printing)	274a
Exhibit B. Order No. 1 (Copy) (Omitted in printing)		274b
Exhibit C. Executive Order (Copy) (Omitted in printing)		274c

Record in United States Steel Company Case #1624-52—
Continued

	Original	Print
Complaint for declaratory judgment and injunctive relief—Continued		
Motion for preliminary injunction (Omitted in printing)	275	
Points and authorities in support of motion (Omitted in printing)	277	
Amendment No. 1 to complaint (Omitted in printing)	279	
Notice of special appearance	281	210
Opposition to motion for a preliminary injunction, attachments, and affidavits in support (Copies) (Omitted in printing)	283	
Affidavit of John A. Stephens (Omitted in printing)	369	
Affidavit of Wilbur L. Lohrentz (Omitted in printing)	386	
Affidavit of Lewis M. Parsons (Omitted in printing)	395	
Proofs of service (Omitted in printing)	401	
Motion to dismiss or, in lieu thereof, to quash the return of service of summons	404	212
Motion to withdraw verbal amendment and to proceed on the basis of motion for preliminary injunction—granted (Omitted in printing)	411	
Application for stay of the order granting preliminary injunction (Omitted in printing)	412	
Designation of record (Omitted in printing)	414	
Order to transmit original record (Omitted in printing)	415	
Preliminary injunction (Omitted in printing)	416	
Notice of appeal (Omitted in printing)	418	
Record in Republic Steel Corporation Case #15396-2	712	
Complaint for injunction and for a declaratory judgment and other relief (Omitted in printing)	712	
Affidavit of John M. Schlendorf (Omitted in printing)	719	
Summons and service (Omitted in printing)	723	
Motion for preliminary injunction (Omitted in printing)	725	
Memorandum of points and authorities (Omitted in printing)	727	
Motion for temporary restraining order	728	213
Order denying (Omitted in printing)	730	
Affidavit of Eugene Magee (Omitted in printing)	731	
Notice of special appearance	735	214
Stipulation (Omitted in printing)	737	
Opposition to motion for a preliminary injunction, attachments and affidavits in support (Copies) (Omitted in printing)	739	
Motion to dismiss or, in lieu thereof, to quash the return of service of summons	813	216
Application for stay of the order granting preliminary injunction (Omitted in printing)	820	

Record in Republic Steel Corporation Case #1539-52—

Continued

	Original	Print
Designation of record (Omitted in printing)	822	
Order to transmit original record (Omitted in printing)	823	
Preliminary injunction (Omitted in printing)	824	
Notice of appeal (Omitted in printing)	826	
Supplemental record in cases Nos. 1539-52, 1549-52, and 1550-52, filed in the Court of Appeals, May 7, 1952.		
Clerk's certificate (Omitted in printing)	1504	
Transcript of hearing April 9, 1952, before Judge Holtzoff	1506	217
Appearances	1507	217
Argument on behalf of Youngstown Sheet and Tube Co. by Mr. Wilson	1508	218
Argument on behalf of Republic Steel Corporation by Mr. Gall	1529	230
Argument on behalf of Republic Steel Corporation by Mr. Patton	1537	235
Argument on behalf of Bethlehem Steel Co. by Mr. Bromley	1542	238
Argument on behalf of defendant by Mr. Baldrige	1562	250
Reply argument on behalf of Youngstown Sheet and Tube Co. by Mr. Wilson	1581	261
Oral opinion, Holtzoff, J.	1585	263
Transcript of hearing April 10, 1952, before Judge Bastian	1593	267
Transcript of proceedings, April 10, 1952	1204	270
Transcript of proceedings, April 24, 1952	1220	278
Appearances	1221	280
Statement by Theodore Kiendl	1227	285
Bruce Bromley	1290	322
Luther Day	1301	329
Charles Tuttle	1313	337
John C. Bane, Jr.	1333	349
John J. Wilson	1341	353
Randolph W. Childs	1349	358
Holmes Baldrige	1350	359
Transcript of proceedings, April 25, 1952	1375	374
Statement by Holmes Baldrige	1376	374
John J. Wilson	1418	399
Theodore Kiendl	1434	408
Charles Tuttle	1440	412
Randolph W. Childs	1452	419
Reporter's certificate (Omitted in printing)	1465	428
Clerk's certificate (Omitted in printing)	1469	
Summons and service in cases Nos. 1624-52, 1625-52, and 1732-52 (Omitted in printing)	1470	
Motion for preliminary injunction in Armco Steel Corporation case #1700-52 (Omitted in printing)	1476a	

INDEX

ix

Supplemental record in cases Nos. 1539-52, 1549-52; and
1550-52, filed in the Court of Appeals, May 7, 1952—
Continued

	Original	Print
Memorandum of points and authorities (Omitted in printing)	1477	
Transcript of proceedings, April 30, 1952	1480	428
Reporter's certificate (Omitted in printing)	1500	439
Proceedings in U.S.C.A. for the District of Columbia Circuit	1178	440
Application for stay pending appeal from order granting preliminary injunction	1166	442
Minutes on hearing of application (Omitted in printing)	1175	
Order dated April 30, 1952 staying order of the United States District Court for the District of Columbia	1178	444
Application to attach condition to stay in order to protect appellees from irreparable injury	1181	444
Memorandum in support of application to attach condition to stay (Omitted in printing)	1184	
Minutes on hearing of application (Omitted in printing)	1191	
Order dated May 1, 1952 denying application of appellees to attach condition to stay	1194	446
Opinion	1197	447
Designation of record (Omitted in printing)	1201	
Clerk's certificate (Omitted in printing)	1201B	
Stipulation designating parts of record to be printed	1598	450
Orders allowing certiorari, May 3, 1952	1504	456
Journal entry of Saturday, May 3, 1952	1606	457

[fol. 1]

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

Civil No. 1635—'52

No. 11404—13

**THE YOUNGSTOWN SHEET AND TUBE COMPANY, A BODY COR-
PORATE, Youngstown, Ohio; the Youngstown Metal Prod-
ucts Company, a Body Corporate, Youngstown, Ohio,
Plaintiff**

v.

**CHARLES SAWYER, SECRETARY OF COMMERCE, U. S., THE WEST-
CHESTER, 4000 Cathedral Ave., N.W., Washington, D. C.,
Defendant**

**COMPLAINT FOR INJUNCTION AND FOR A DECLARATORY JUDG-
MENT—Filed April 14, 1952**

Plaintiffs, for their complaint herein, allege:

1. This is an action for a declaratory judgment and for a permanent injunction and other relief, brought pursuant to the provisions of the Act of June 25, 1948, c. 646, 62 Stat. 964, as amended by the Act of May 24, 1949, c. 139, sec. 111, 63 Stat. 105 (28 U. S. C. A. secs. 2201 and 2202). There is now existing between the parties an actual controversy, justiciable in character, in respect of which the plaintiffs need a declaration of their rights by this Court.

2. The plaintiffs herein are The Youngstown Sheet and Tube Company and The Youngstown Metal Products Com-
pany.

a. The Youngstown Sheet and Tube Company is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Ohio.

b. The Youngstown Metal Products Company is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Ohio.

3. The defendant, Charles Sawyer, is Secretary of Commerce of the United States of America and is a resident of the District of Columbia.

[fol. 2] 4. This action arises out of the threatened seizure of various steel-producing properties and facilities of plaintiffs by defendant, acting in pursuance of Executive Order No. , issued by the President of the United States and purporting to authorize such seizure. Said Executive Order is violative of the Constitution of the United States and is unauthorized by any law or statute of the United States presently in force and effect. The amount in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.

5. (a) Plaintiff, the Youngstown Sheet and Tube Company, is engaged in the manufacture and distribution of a diversified line of steel products, coke by-products and pig iron and distribution of oil country goods, such as drilling machinery, ordinarily used in production of oil and gas. Plaintiff owns and operates numerous steel manufacturing and processing plants. Plaintiff's principal manufacturing facilities are its Campbell plant, located at Campbell, Ohio, and Struthers, Ohio; its Brier Hill Works, located at Youngstown, Ohio; its Hubbard Works, located at Hubbard, Ohio; its Indiana Harbor Works, located at East Chicago, Indiana; and its South Chicago Works, located at South Chicago, Illinois. These facilities consist of large tracts of land upon which are located furnaces, manufacturing and processing mills, machinery, and other steel-producing equipment and incidental facilities. In the operation of the aforesaid facilities Plaintiff owns and uses extensive real and personal properties, funds, rights, franchises, and other valuable assets.

(b) Plaintiff, The Youngstown Metal Products Company, owns and operates a plant at Youngstown, Ohio, and is engaged in the business of metal stamping and processing of steel products.

6. Neither of plaintiffs has received from the President of the United States, from the Atomic Energy Commission, or from any Government agency any order for materials [fol. 3] placed pursuant to the provisions of Title I, Section 18 of the Universal Military Training and Service Act of 1951 (62 Stat. 625; 50 U. S. C. A. App. sec. 468).

7. At each of the plants and mills operated by plaintiffs and referred to in paragraph 5 hereof, there are employees

represented for the purposes of collective bargaining by the United Steelworkers of America (hereinafter called the Union).

8. At all relevant times prior to April 1952, the plaintiffs had enjoyed peaceful possession and the exclusive operation of the properties referred to in par. 5 hereof and had operated the same in all respects consistent with applicable laws of the United States and of the various States of the United States having jurisdiction thereof.

9. On December 31, 1951, the several contracts which had theretofore been in effect between the plaintiffs and the Union covering, among other things, wages and terms and conditions of employment, expired. Prior to that date negotiations between the plaintiffs and the Union looking toward the execution of further such contracts had been commenced.

10. Continued negotiations between the plaintiffs and the Union having been unproductive, the President of the Union issued an ultimatum stating that at 12:01 A. M. on April 9, 1952, all employees represented by the Union and working at the iron and steel producing and manufacturing plants, and other facilities of the plaintiffs would be ordered to, and would, discontinue their work for the plaintiffs and would thereafter engage in an organized strike against the plaintiffs.

11. On April 11, 1952, the President of the United States promulgated Executive Order No. 10467, a copy of which is annexed hereto as Exhibit A, directing the seizure by the defendant of the properties of the plaintiffs referred to in par. 5 hereof.

[fol. 4] 12. The Congress has provided in the Labor Management Relations Act of 1947 specific and adequate machinery for the adjustment of the proposed strike and has specifically rejected the device of seizure as a means of settling labor disputes.

13. Executive Order No. 10467 and the actions of the defendant herein taken or to be taken in pursuance thereof are without authority under any presently existing statute of, or any provision of the Constitution of, the United States and are invalid, unlawful and without effect.

14. The actions of the defendant taken or to be taken in pursuance of said Executive Order have already affected,

and will continue adversely and irreparably to affect, the business of the plaintiffs in that

(a) said seizure, being unlawful, will deprive the plaintiffs of their properties without due process of law and the plaintiffs will have no adequate remedy at law;

(b) said seizure will result in the disruption of normal customer relationships between the plaintiffs and their customers, the great majority of whom have pending orders with the plaintiffs for steel and steel products usable and to be used in the civilian economy of the United States having no relation to any war effort of the United States;

(c) said seizure will give to the defendant access to confidential information and trade secrets in the files of the plaintiffs with regard to the business of the plaintiffs and their many customers in the United States;

[fol. 5] (d) said seizure will deprive the plaintiffs of their rights to bargain collectively with their employees and will constitute an unlawful interference therewith, for which there is no adequate remedy at law; and

(e) said seizure will threaten the plaintiffs and their directors, officers, agents and employees with criminal penalties in relation to any action taken by them to resist said unlawful seizure.

WHEREFORE, the plaintiffs pray:

(a) that this Court decree that Executive Order No. is without authority under any law of the United States or under the Constitution of the United States and is, therefore, invalid and void;

(b) that this Court decree that all action taken by the defendant pursuant to said Executive Order is invalid, unlawful and without effect;

(c) that this Court, by reason of the fact that immediate and irreparable injury, loss and damage will result to the plaintiffs by the acts of the defendant before notice can be served and a hearing held thereon, grant a temporary re-

straining order without notice to the defendant, and thereafter, pending final hearing and determination of this action, enter an order granting an interlocutory injunction restraining the defendant, and his successor or successors in office, his assistants, employees, agents and other persons acting under his control and authority, (i) from taking any steps or continuing to take any steps whatsoever to effectuate and carry out the provisions of Executive Order No. promulgated by the President of the United States insofar as said Executive Order is intended to apply to [fol. 6] the plaintiffs herein, their officers, agents and the management of their properties, (ii) from molesting or interfering with or doing any act or thing which would prevent or tend to prevent the plaintiffs, their officers, agents and employees, from operating the plaintiffs' properties for their own account, (iii) from in any respect changing the wages or other terms or conditions of employment in effect at the properties of the plaintiffs at the time of promulgation of said Executive Order and (iv) from interfering in any other way with the plaintiffs' contractual relations with others or with the plaintiffs' rights of ownership of their businesses and properties;

(d) that this Court, upon final hearing and determination of this action, enter a decree permanently enjoining the defendant, and his successor or successors in office, his assistants, employees, agents and other persons acting under his control and authority, (i) from taking any steps whatsoever to effectuate and carry out the provisions of Executive Order No. promulgated by the President of the United States insofar as said Executive Order is intended to apply to the plaintiffs herein, their officers, agents and the managements of their properties, (ii) from molesting or interfering with or doing any act or thing which would prevent or tend to prevent the plaintiffs, their officers, agents and employees, from operating the plaintiffs' properties for their own account, (iii) from in any respect changing the wages or other terms or conditions of employment in effect at the properties of the plaintiffs at the time of promulgation of said Executive Order and (iv) from interfering in any other way with the plaintiffs' rights or ownership of their businesses and properties; and

[fol. 7] (e) that the plaintiffs have such other and further relief as to the Court may seem just and proper.

John C. Gall, 401 Commonwealth Building, Washington, D. C.; John J. Wilson, 815 Fifteenth Street NW., Washington, D. C.; J. E. Bennett, Stambaugh Building, Youngstown, Ohio, Attorneys for Plaintiff.

April 14, 1952.

[File endorsement omitted.]

[fol. 8]

April 8, 1952.

EXECUTIVE ORDER

Directing the Secretary of Commerce to Take Possession of and Operate the Plants and Facilities of Certain Steel Companies

Whereas on December 16, 1950, I proclaimed the existence of a national emergency which requires that the military, naval, air, and civilian defenses of this country be strengthened as speedily as possible to the end that we may be able to repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made throughout the United Nations and otherwise to bring about a lasting peace; and

Whereas American fighting men and fighting men of other nations of the United Nations are now engaged in deadly combat with the forces of aggression in Korea, and forces of the United States are stationed elsewhere overseas for the purpose of participating in the defense of the Atlantic Community against aggression; and

Whereas the weapons and other materials needed by our armed forces and by those joined with us in the defense of the free world are produced to a great extent in this country, and steel is an indispensable component of substantially all of such weapons and materials; and

Whereas steel is likewise indispensable to the carrying out of programs of the Atomic Energy Commission of vital importance to our defense efforts; and

Whereas a continuing and uninterrupted supply of steel

is also indispensable to the maintenance of the economy of the United States, upon which our military strength depends; and

Whereas a controversy has arisen between certain companies in the United States producing and fabricating steel and the elements thereof and certain of their Workers represented by the United Steelworkers of America, CIO, regarding terms and conditions of employment; and

Whereas the controversy has not been settled through the processes of collective bargaining or through the efforts of the Government, including those of the Wage Stabilization Board, to which the controversy was referred on December 22, 1951, pursuant to Executive Order No. 10233, and a strike has been called for 12:01 A. M., April 9, 1952; and

Whereas a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field; and

[fol. 9] Whereas in order to assure the continued availability of steel and steel products during the existing emergency, it is necessary that the United States take possession of and operate the plants, facilities, and other property of the said companies as hereinafter provided:

Now, therefore, by virtue of the authority vested in me by the Constitution and laws of the United States, and as President of the United States and Commander in Chief of the armed forces of the United States, it is hereby ordered, as follows:

1. The Secretary of Commerce is hereby authorized and directed to take possession of all or such of the plants, facilities, and other property of the companies named in the list attached hereto, or any part thereof, as he may deem necessary in the interests of national defense; and to operate or to arrange for the operation thereof and to do all things necessary for, or incidental to, such operation.
2. In carrying out this order the Secretary of Commerce may act through or with the aid of such public or private instrumentalities or persons as he may designate; and all

Federal agencies shall cooperate with the Secretary of Commerce to the fullest extent possible in carrying out the purposes of this order.

3. The Secretary of Commerce shall determine and prescribe terms and conditions of employment under which the plants, facilities, and other properties possession of which is taken pursuant to this order shall be operated. The Secretary of Commerce shall recognize the rights of workers to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining, adjustment of grievances, or other mutual aid or protection, provided that such activities do not interfere with the operation of such plants, facilities, and other properties.

4. Except so far as the Secretary of Commerce shall otherwise provide from time to time, the managements of the plants, facilities, and other properties possession of which is taken pursuant to this order shall continue their functions, including the collection and disbursement of funds in the usual and ordinary course of business in the names of their respective companies and by means of any instrumentalities used by such companies.

5. Except so far as the Secretary of Commerce may otherwise direct, existing rights and obligations of such companies shall remain in full force and effect, and there may be made, in due course, payments of dividends on stock and of principal, interest, sinking funds, and all other distributions upon bonds, debentures, and other obligations, and expenditures may be made for other ordinary corporate or business purposes.

6. Whenever in the judgment of the Secretary of Commerce further possession and operation by him of any plant, facility, or other property is no longer necessary or expedient in the interest of national defense, and the Secretary has reason to believe that effective future operation is [fol. 10] assured, he shall return the possession and control thereof at the time possession was taken under this order.

7. The Secretary of Commerce is authorized to prescribe and issue such regulations and orders not inconsistent herewith as he may deem necessary or desirable for carrying out the purposes of this order; and he may delegate and

authorize subdelegation of such of his functions under this order as he may deem desirable.

Harry S. Truman.

The White House, April 8, 1952.

-[fol. 11]

List

- American Bridge Company, 525 William Penn Place, Pittsburgh, Pennsylvania.
- American Steel & Wire Company of New Jersey, Rockefeller Building, Cleveland, Ohio.
- Columbia Steel Company, Russ Building, San Francisco, California.
- Consolidated Western Steel Corporation, Los Angeles, California.
- Geneva Steel Company, Salt Lake City, Utah.
- Gerrard Steel Strapping Company, 2915 W. 47th Street, Chicago 32, Illinois.
- National Tube Company, 525 William Penn Place, Pittsburgh, Pennsylvania.
- Oil Well Supply Company, 2001 North Lamar Street. Dallas, Texas.
- Tennessee Coal, Iron & Railroad Company, Fairfield, Alabama.
- United States Steel Corporation, 71 Broadway, New York 6, New York.
- United States Steel Products Company, 30 Rockefeller Plaza, New York, New York.
- United States Steel Supply Company, 208 South LaSalle Street, Chicago, Illinois.
- Virginia Bridge Company, Roanoke, Virginia.
- Alan Wood Steel Company and Subsidiaries, Conshohocken, Pennsylvania.
- American Chain and Cable Company, Incorporated, 929 Connecticut Avenue, Bridgeport 2, Connecticut.
- American Chain and Cable Company, Monessen, Pennsylvania.
- Armco Steel Corporation, 703 Curtis Street, Middletown, Ohio.
- Armco Drainage & Metal Products, Inc., 703 Curtis Street, Middletown, Ohio.

[fol. 12] Atlantic Steel Company, P. O. Box 1714, Atlanta, Georgia.

Babcock and Wilcox Tube Company, Beaver Falls, Pennsylvania.

Borg-Warner Corporation, 310 S. Michigan Avenue, Chicago 4, Illinois.

Continental Copper and Steel Industries, Incorporated, Braeburn, Pennsylvania.

Continental Steel Corporation, West Markland Avenue, Kokomo, Indiana.

Copperweld Steel Company, Glassport, Pennsylvania.

Detroit Steel Corporation, 1025 South Oakwood Avenue, Detroit 9, Michigan.

Eastern Stainless Steel Corporation, Baltimore 3, Maryland.

Firth Sterling Steel and Carbide Corporation, Demmler Road, McKeesport, Pennsylvania.

Follansbee Steel Corporation, 3rd and Liberty Avenue, Pittsburgh 22, Pennsylvania.

Granite City Steel Company, 20th Street and Madison Avenue, Granite City, Illinois.

Great Lakes Steel Corporation, Tecumseh Road, Ecorse, Detroit 18, Michigan.

Hanna Furnace Corporation, Ecorse, Detroit 18, Michigan.

Harrisburg Steel Corporation, 10th and Herr Streets, Harrisburg, Pennsylvania.

Boiardi Steel Company, Milton, Pennsylvania.

Heppenstall Company, 4620 Hatfield Street, Pittsburgh, Pennsylvania.

Inland Steel Company, 38 S. Dearborn Street, Chicago 3, Illinois.

Joseph T. Ryerson & Son, Incorporated, 2558 W. 16th Street, Chicago 80, Illinois.

Interlake Iron Corporation, 1900 Union Commerce Building, Cleveland 14, Ohio.

[fol. 13] Pacific States Steel Corporation, Lathan Square Building, Oakland 12, California.

Pittsburgh Coke & Chemical Company, 1905 Grant Building, Pittsburgh 19, Pennsylvania.

H. K. Porter Company, Incorporated, 1932 Oliver Building, Pittsburgh 22, Pennsylvania.

- Buffalo Steel Division, H. K. Porter Company, Incorporated, Fillmore Avenue, Tonawanda, New York.
 Joslyn Manufacturing & Supply Company, 20 N. Wacker Drive, Chicago 6, Illinois.
 Joslyn Pacific Company, 5100 District Boulevard, Los Angeles 11, California.
 Latrobe Electric Steel Company, Latrobe, Pennsylvania.
 E. J. Lavino & Company, 1528 Walnut Street, Philadelphia, Pennsylvania.
 Lukens Steel Company, S. First Avenue, Coatesville, Pennsylvania.
 McLouth Steel Corporation, 300 S. Livernois, Detroit 17, Michigan.
 Newport Steel Corporation, Ninth and Lowell Streets, Newport, Kentucky.
 Northwest Steel Rolling Mills, Incorporated, 4315 9th Street, NW., Seattle, Washington.
 Northwestern Steel & Wire Company, Sterling, Illinois.
 Reeves Steel Manufacturing Company, 137 Iron Avenue, Dover, Ohio.
 John A. Roebling's Sons Company, 640 South Broad Street, Trenton, New Jersey.
 Rotary Electric Steel Company, Box 90, Detroit 20, Michigan.
 Sheffield Steel Corporation, Sheffield Station, Kansas City 3, Missouri.
 Shenango-Penn Mold Company, 812 Oliver Building, Pittsburgh 30, Pennsylvania.
 [fol. 14] Shenango Furnace Company, 812 Oliver Building, Pittsburgh 30, Pennsylvania.
 Stanley Works, 195 Lake Street, New Britain, Connecticut.
 Universal Cyclops Steel Corporation, Station Street, Bridgeville, Pennsylvania.
 Vanadium-Alloys Steel Company, Latrobe, Pennsylvania.
 Vulcan Crucible Steel Company, 1 Main Street, Aliquippa, Pennsylvania.
 Wheeling Steel Corporation, 1134 Market Street, Wheeling, West-Virginia.
 Woodward Iron Company, Woodward, Alabama.
 Allegheny Ludlum Steel Corporation, Oliver Building, Pittsburgh 22, Pennsylvania.

- Bethlehem Steel Company, 701 East 3rd Street, Bethlehem, Pennsylvania.
- Bethlehem Pacific Coast Steel Corporation, 20th & Illinois Streets, San Francisco, California.
- Bethlehem Supply Company of California, Los Angeles, California.
- Bethlehem Supply Company, Tulsa, Oklahoma.
- Buffalo Tank Corporation, Lackawanna, New York, Charlotte, North Carolina, Dunellen, New Jersey.
- Dundalk Company, Sparrows Point, Maryland.
- A. M. Byers Company, 717 Liberty Avenue, Pittsburgh 30, Pennsylvania.
- Colorado Fuel Iron Corporation, 575 Madison Avenue, New York 22, New York.
- Claymont Steel Corporation, Claymont, Delaware.
- Crucible Steel Company, Oliver Building, Pittsburgh 22, Pennsylvania.
- Jones & Laughlin Steel Corporation, Third Avenue and Ross Street, Pittsburgh 30, Pennsylvania.
- [fol. 15] J. & L. Steel Barrel Company, 3711 Sepviva Street, Philadelphia 37, Pennsylvania.
- National Supply Company, 1400 Grant Building, Pittsburgh 30, Pennsylvania.
- Pittsburgh Steel Company, 1600 Grant Building, Pittsburgh 19, Pennsylvania.
- Johnston Steel & Wire Company, Incorporated, 53 Wiser Avenue, Worcester 1, Massachusetts.
- Republic Steel Corporation, Republic Building, Cleveland 1, Ohio.
- Truscon Steel Company, 1315 Albert Street, Youngstown, Ohio.
- Rheem Manufacturing Company, Russ Building, San Francisco 4, California.
- Sharon Steel Corporation, S. Irving Avenue, Sharon, Pennsylvania.
- Valley Mould & Iron Corporation, Hubbard, Ohio.
- Youngstown Sheet & Tube Company, 44 Central Square, Youngstown 1, Ohio.
- Emsco Derrick & Equipment Company, 6811 S. Alameda Street, Los Angeles 1, California.

[fol. 16] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

[File endorsement omitted]

MOTION FOR PRELIMINARY INJUNCTION

Come now the plaintiffs, by their undersigned attorneys, and move the Court for a preliminary injunction to restrain and prevent the defendant and those acting for and in his stead from committing and doing, and continuing to commit and do the unlawful and unconstitutional acts against the plaintiffs which are set forth in the Complaint heretofore filed herein.

John C. Gall, Commonwealth Building; John J. Wilson, 815 15th Street, NW.; J. E. Bennett, Stambaugh Building, Youngstown, Ohio, Attorneys for Plaintiffs.

[Certificate of service omitted in printing.]

[fol. 17] IN THE UNITED STATES DISTRICT COURT

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION—Filed April 23, 1952

[Title omitted]

[File endorsement omitted]

Rule 65, Federal Rules of Civil Procedure.

The Complaint filed herein.

John C. Gall, Commonwealth Building, John J. Wilson, 815 15th Street N. W., J. E. Bennett, Stambaugh Building, Youngstown, Ohio, Attorneys for Plaintiffs.

[fol. 18] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

[File endorsement omitted]

AFFIDAVIT IN SUPPORT OF APPLICATION FOR A TEMPORARY RE-
STRAINING ORDER AND/OR PRELIMINARY INJUNCTION—Filed
April 24, 1952

DISTRICT OF COLUMBIA, SS:

Herman J. Spoerer, being first duly sworn, on oath deposes and states that he is the Director of Industrial Relations of the plaintiffs in the above entitled civil action, and makes this affidavit to supplement and bring up to date the complaint and the affidavit of Walter E. Watson heretofore filed herein, the contents of which he hereby reaffirms; that affiant makes this affidavit to support the application of plaintiffs for a temporary restraining order and/or preliminary injunction against the defendant; that the defendant, having seized and now holding the steel plants and properties of the plaintiffs against their will, has in effect threatened, declared, announced and asserted that in the immediate future he will order and direct an increase in the wages of the employees of plaintiffs' business; that unless the defendant is restrained and enjoined immediately, he will put such increased wages into effect and will compel plaintiffs' business to pay the same out of plaintiff's funds; that such wage increases involved in the foregoing will cost the plaintiffs annually large sums of money believed to be in the millions of dollars and payment thereof by the plaintiffs [fol. 19] under the coercion and force of the defendant will dissipate a substantial portion of the assets of the plaintiffs and cannot properly be absorbed under the present circumstances, nor can the cost thereof be justified according to sound business methods and considerations, and it will be impossible to recover from their employees said sums so paid; that plaintiffs and this affiant believe that such funds so disbursed and dissipated could not be recovered from the defendant himself because the sum is so great that he lacks sufficient wealth with which to pay a judgment therefor; that, prior to January 1, 1952, negotiations in the nature of collective bargaining began and thereafter continued be-

tween plaintiffs and other members of the steel industry, on the one hand and the United Steelworkers of America (CIO), representing employees of plaintiffs and other steel companies, on the other, regarding wages, hours and working conditions of said employees beginning January 1, 1952; that these negotiations related to the demands of the Union for increased wages and certain so-called "fringe" benefits, including, for example, holiday pay and increased vacation pay and shift premium, and for a union shop and for a number of other items, such, for example, as management rights, incentives, local working conditions, Saturday and Sunday premium pay, seniority and duration of contract; that the parties have been unable to reach an agreement regarding the foregoing; that the increase in wages about to be ordered by the defendant would satisfy a portion of the aforesaid demand of the said Union but will impair and destroy the lawful, proper and effective bargaining position of the plaintiffs with said Union, in that the plaintiffs' employees will have secured an increase in wages without at the same time abandoning or modifying any of their demands, and without disturbing or impairing the Union's bargaining position for greater increases, for a union shop, and for the other items aforesaid; that the damage which [fol. 20] plaintiffs are about to suffer and sustain in this connection is not capable of being compensated for in money and is otherwise irreparable; that, in addition to the foregoing, and based upon previous conduct of the Government in relation to the coal industry, affiant believes that defendant will require plaintiffs, as a condition for the return of their seized properties, to adopt, accept and subscribe to such wage increases, and affiant adds that, whether or not such condition is imposed, it will be impossible as a practical matter to return to the wages which existed prior to such increases; and that by reason of the foregoing, immediate and irreparable injury, loss and damage will result to the plaintiffs for which they have no adequate remedy except by temporary restraining order immediately issued.

Herman J. Spoerer.

Subscribed and sworn to before me this 23d day of April, 1952. Hugh R. Tankersley, Notary Public,
D. C. My commission expires April 14, 1957.
(Seal.)

[fol. 21] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

[File endorsement omitted]

**AFFIDAVIT IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A
RESTRAINING ORDER AND FOR A PRELIMINARY INJUNCTION—
Filed April 24, 1952**

DISTRICT OF COLUMBIA, ss:

Walter E. Watson, being duly sworn, deposes and states:

1. I am the first vice-president of the plaintiff, The Youngstown Sheet and Tube Company, and president of the plaintiff, The Youngstown Metal Products Company.

2. This affidavit is made in support of the application of the plaintiffs for an interlocutory injunction restraining and enjoining the defendant from the continued seizure by him of the properties of the plaintiffs, as hereinafter described, and the application of the plaintiffs for a temporary restraining order pending decision upon the aforesaid application.

3. (a) Plaintiff, The Youngstown Sheet and Tube Company, is engaged in the manufacture and distribution of a diversified line of steel products, coke by-products and pig iron and distribution of oil country goods, such as drilling machinery, ordinarily used in production of oil and gas. Plaintiff owns and operates numerous steel manufacturing and processing plants. Plaintiff's principal manufacturing facilities are at its Campbell plant, located at Campbell, [fol. 22] Ohio, and Struthers, Ohio; its Brier Hill Works, located at Youngstown, Ohio; its Hubbard Works, located at Hubbard, Ohio; its Indiana Harbor Works, located at East Chicago, Indiana; and its South Chicago Works, located at South Chicago, Illinois. These facilities consist of large tracts of land upon which are located furnaces, manufacturing and processing mills, machinery, and other steel producing equipment and incidental facilities. In the operation of the aforesaid facilities Plaintiff owns and uses extensive real and personal properties, funds, rights, franchises and other valuable assets.

(b) Plaintiff, The Youngstown Metal Products Company, owns and operates a plant at Youngstown, Ohio, and is engaged in the business of metal stamping and processing of steel products.

4. All of said steel manufacturing and processing plants and facilities and other properties of the plaintiffs have been seized by the defendant, and plaintiffs thereby have been deprived of the possession, control and use of said properties to the irreparable injury, loss and damage of the plaintiffs and each of them.

5. Neither the President of the United States nor any person acting under his authority has placed with the plaintiffs or with either of them, under the provisions of Section 18 of the Selective Service Act of 1948, as amended (62 Stat. 625, 50 U. S. C. A. App. 648), any order for any articles or materials for the use of the Armed Forces of the United States or for the use of the Atomic Energy Commission.

6. Said seizure is a coercive effort by the defendant to compel the plaintiffs to accept the recommendations of the Wage Stabilization Board in a labor dispute which began in November, 1951, between the plaintiffs and the United Steel Workers of America representing the production and maintenance employees of the plaintiffs for the purpose of collective bargaining; and should said effort fail affiant believes, based upon a similar situation in the past in the coal industry, that said defendant will saddle the plaintiffs with labor contracts to be made by the defendant with said [fol. 23] union in order to put into effect the recommendations of the said Board, which recommendations will not only greatly increase plaintiffs' costs of operation, but will seriously interfere with rights of management of the business, and will coerce employees not now members of the union to become such. Neither plaintiffs nor the respective businesses of plaintiffs can afford to accept such recommendations as to wage increases, unless authority to make a compensating increase in the price of steel shall be granted to the plaintiffs by the Office of Price Stabilization. Thus, plaintiffs are threatened with irreparable injury.

7. If said recommendations shall be put into effect, irreparable injury will result and continue to result even after

plaintiffs' property shall have been returned to them. It would be impossible for the plaintiffs then to recede from the increased wage rates and other benefits and to cancel such union shop provisions. Such injury will be directly attributable to the action of the defendant against which plaintiffs will not have any adequate legal recourse.

8. The seizure of the properties of the plaintiffs has caused and will continue to cause the plaintiffs irreparable injury in many other respects, of which the following are examples:

(a) The steel industry is a highly competitive business and the plaintiffs have many trade secrets and methods of doing business which are confidential and which the plaintiffs would not under any circumstances be willing to have revealed to their competitors. The agent of the defendant in control of the properties of the plaintiffs have access to such secrets and methods and there is grave danger that they may be revealed to the competitors of the plaintiffs and to others who do not have any right to information regarding them.

(b) The plaintiffs over the years have built up substantial relationships with their customers and during the current national defense effort have done their best to maintain such relationships in a way consistent with the requirements of the national defense effort. During the period of seizure by the defendant, the business of the plaintiffs [fol. 24] will be subject to the control of defendant and his agents who do not have any particular reason for protecting such relationships and there is grave danger that such relationships will be impaired to the irreparable detriment of the plaintiffs.

(c) The operation of the business of the plaintiffs is highly technical and requires the constant attendance of persons who are thoroughly experienced therein. During the period of defendant's control, the operation of the business will be subject to the orders of defendant and his agents, many of whom, doubtless, will not have any experience whatsoever in the operation of steel plants and related facilities. There is grave danger that the seized plants and

other facilities of the plaintiffs will be irreparably harmed by the orders of defendant and his agents.

Walter E. Watson.

Subscribed and sworn to before me this 8th day of April, 1952. Mary Whiston, Notary Public, D. C. My Commission expires Aug. 31, 1953. (Seal.)

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION—Filed April 25, 1952

Defendant opposes the granting of a preliminary injunction on the following grounds, viz:

1. The breakdown of collective bargaining negotiations in the steel industry, resulting in the action of the steel companies in cooling off their furnaces in anticipation of suspension of manufacture and the action of the union in calling a strike to begin at 12:01 a. m. on April 9, 1952, created an immediately impending national emergency because interruption of steel manufacture for even a brief period would seriously endanger the well-being and safety of the United States in a critical situation.

2. The President of the United States of America has inherent power in such a situation to take possession of the steel companies in the manner and to the extent which he did by his Executive Order of April 8, 1952. This power is supported by the Constitution, by historical precedent, and by court decisions.

3. The courts are without power to negate executive action of the President of the United States of America by enjoining it and by enforcing their injunctions by imprisonment or other process against the President.

April 23, 1952. Copy Received, John C. Gall, Attorney for Plaintiffs.

[fol. 26] 4. The granting of a preliminary injunction is never a matter of right. The courts, even as between pri-

vate parties, will not interfere in advance of a full hearing on the merits except upon a showing that the damage to flow from a refusal of a temporary injunction is irreparable and outweighs the harm which would result from a denial of the temporary injunction. When, as in the present case, the interest of the public is involved, the courts are particularly hesitant to interfere.

5. Since the management of the steel companies is left in control under the arrangements which existed as of the time of taking, and since the right of the companies to recover all damages resulting from the taking has been recognized by Supreme Court decisions, there is no showing that the companies' legal remedy is inadequate or that their injury is irreparable, and hence the companies have not met the conventional conditions precedent to the granting of the kind of order they request.

This opposition is based on the affidavits of Robert A. Lovett, Secretary of Defense; Gordon Dean, Chairman of the United States Atomic Energy Commission; Magly Fleischmann, Administrator of the Defense Production Administration; Henry H. Fowler, Administrator of the National Production Authority; Oscar L. Chapman, Secretary of the Interior; Jess Larson, Administrator of General Services; Homer C. King, Acting Administrator of the Defense Transportation Administration; Charles Sawyer, Secretary of Commerce; Harry Weiss, Executive Director of the Wage Stabilization Board; and Nathan P. Fein- [fol. 27] singer, Chairman of the Wage Stabilization Board filed herewith, and on the defendant's memorandum of points and authorities filed herewith, all of which are by reference made a part hereof.

A. Holmes Baldridge, per M. C. T., Assistant Attorney General. Marvin C. Taylor, J. Gregory Bruce, per M. C. T., Attorneys, Department of Justice.

[fol. 28] [Executive Order omitted. Printed side page, 8 ante.]

[fol. 38] . . . Telegram

President, — — — Steel Company

The President of the United States by virtue of the authority vested in him by the Constitution and laws of the United States and as Commander in Chief of the armed forces of the United States has directed me, as Secretary of Commerce, by an Executive Order dated April 8, 1952, to take possession of all properties of your company which I deem necessary in the interests of national defense. I deem it necessary in such interests to take possession of, and hereby do take possession effective twelve o'clock midnight, Eastern Standard Time, April 8, 1952, of all properties of your company exclusive of railroads whose employees are subject to the Railway Labor Act and any and all coal and metal mines. You are being called upon as a loyal and patriotic citizen to serve as and are appointed Operating Manager for the United States of the properties of your company, possession of which is hereby taken, to continue operation of them for the United States. Please make acknowledgment of this call to serve by return wire in substantially the following form:

"I acknowledge receipt of appointment as Operating Manager on behalf of the United States of properties of my company."

You are authorized and directed to continue operations for the United States. All officers and employees are directed forthwith to perform their usual functions and duties in connection with plant and office operation, and sale and distribution of products. Fly the flag of the United States and post notice of taking possession by the United States [fol. 39] at all premises affected. In respect of all production and distribution, proceed in accordance with previously prevailing practices. Set up books in order to keep separate the period of Government operation. Advise all employees of the program. Be governed by applicable state and federal laws and orders, regulations and directives which have been or may be issued thereunder. In respect of any properties which you feel are not, or will not be, involved in controversies referred to in the Executive Order

of the President, you may submit a recommendation that operation of such properties on behalf of the Government be terminated. Further instructions will follow.

Am mailing immediately copies of Executive Order of the President, my Order No. 1 under that Order, and notice of taking possession.

If you are ~~not~~ acting as chief executive officer of the company, consider this telegram as directed to the officer who is so acting.

Charles Sawyer, Secretary of Commerce.

[fol. 40] UNITED STATES DEPARTMENT OF COMMERCE

April 8, 1952.

Order No. 1

By virtue of the authority vested in me by the President of the United States under an Executive Order dated April 8, 1952, "Directing the Secretary of Commerce to take possession of and operate the plants and facilities of certain steel companies," I deem it necessary in the interests of national defense that possession be taken of the plants, facilities, and other properties of the companies named in the list specified in Appendix A attached hereto. I therefore take possession effective at twelve o'clock midnight, Eastern Standard Time, April 8, 1952, of such plants, facilities and other properties for operation by the United States in order to assure the continued availability of steel and steel products during the existing national emergency proclaimed on December 16, 1950. The term "plants, facilities and other properties" as used herein shall include but not be limited to any and all real and personal property, franchises, rights, funds and other assets used or useful in connection with the operation of such plants, facilities and other properties and in the distribution and sale of the products thereof, but shall exclude in every instance railroads whose employees are subject to the Railway Labor Act and any and all coal and metal mines.

The president of each company named in the list specified in Appendix A attached hereto (or the chief executive officer of such company) is hereby designated Operating Man-

ager for the United States for such company until further notice, and is authorized and directed, subject to such supervision as I may prescribe, in accordance with such regulations and orders as are promulgated by me or pursuant to authority delegated by me, to operate the plants, facilities and other properties of such company and to do all things necessary and appropriate for the operation thereof and for the distribution and sale of the products thereof.

[fol. 41] The managements, officers and employees, of the plants, facilities and other properties, possession of which is taken pursuant to said Executive Order, are serving the Government of the United States and shall continue their functions, including the collection and disbursements of funds in the usual and ordinary course of business, in the names of their respective companies and by means of any instrumentalities used by such companies.

Existing rights and obligations of such companies shall remain in full force and effect, and there may be made in due course payments of dividends on stock, and of principal, interest, sinking funds, and all other distributions, upon bonds, debentures, and other obligations, and expenditures may be made for other ordinary corporate or business purposes.

No person shall interfere with the operation of the plants, facilities and other properties by the United States Government or the sale or distribution of the products thereof in accordance with this order.

The Operating Manager for the United States shall forthwith fly the flag of the United States upon all premises; and post in a conspicuous place upon the plants, facilities and other properties a notice of taking of possession by the United States.

Possession and operation of any plant, facility, or other property may be terminated by the Secretary of Commerce at such time as he may find that such possession and operation are no longer required in the interests of national defense.

Charles Sawyer, Secretary of Commerce.

- Mr. F. K. McDanel, President, American Bridge Company, 525 Wm. Penn Place, Pittsburgh, Pa.
- Mr. H. B. Jordan, President, American Steel & Wire Co. of N. J., Rockefeller Building, Cleveland 13, Ohio.
- Mr. Alden G. Reach, President, Columbia Steel Company, Russ Building, San Francisco 6, Calif.
- Mr. Joseph H. Carter, President, Pittsburgh Steel Company, 1600 Grant Building, Pittsburgh 19, Pa.
- Mr. C. M. White, President, Republic Steel Corporation, Republic Building, Cleveland 1, Ohio.
- Mr. Richard S. Rheem, President, Rheem Manufacturing Company, 570 Lexington Avenue, New York 22, New York.
- Mr. Henry A. Roemer, Jr., President, Sharon Steel Corporation, Sharon, Pa.
- Mr. Wm. Haig Ramage, President, Valley Mould & Iron Corporation, Hubbard, Ohio.
- Mr. J. Lester Mauthe, President, Youngstown Sheet & Tube Company, Stambaugh Building, Youngstown 1, Ohio.
- Mr. C. L. Austin, President, Jones & Laughlin Steel Corporation, Third Avenue and Ross Street, Pittsburgh 30, Pa.
- Mr. A. E. Walker, President, National Supply Company, 1400 Grant Building, Pittsburgh 30, Pa.
- Mr. A. F. Franz, President, Colorado Fuel & Iron Corporation, 575 Madison Avenue, New York 22, New York.
- Mr. W. H. Colvin, Jr., President, Crucible Steel Company, 405 Lexington Avenue, New York 17, New York.
- Mr. Arthur B. Homer, President, Bethlehem Steel Company, 701 East 3rd Street, Bethlehem, Pa.
- Mr. Alden G. Roach, President, Consolidated Western Steel Corporation, P. O. Box 2105, Terminal Annex, Los Angeles 54, California.
- Mr. Walther Mathesius, President, Geneva Steel Company, P. O. Box 269, Salt Lake City 8, Utah.
- Mr. Henry G. Walter, President, Gerrard Steel Strapping Company, 2915 West 47th Street, Chicago 32, Illinois.
- Mr. J. E. Goble, President, National Tube Co., Frick Building, Pittsburgh 19, Pa.

- Mr. F. F. Murray, President, Oil Well Supply Company, 2001 North Lamar Street, Dallas, Texas.
- Mr. A. V. Wiebel, President, Tennessee Coal, Iron & Railroad Company, Brown-Marx Building, Birmingham, Alabama.
- Mr. Benjamin F. Fairless, President, United States Steel Company, 525 Wm. Penn Place, Pittsburgh, Pa.
- Mr. John Hanerwaas, President, United States Steel Products Co., 30 Rockefeller Plaza, New York, New York.
- [fol. 43] Mr. L. B. Worthington, President, United States Steel Supply Co., 208 South LaSalle Street, Chicago, Illinois.
- Mr. F. K. McDanel, President, Virginia Bridge Company, Roanoke, Virginia.
- Mr. J. T. Whiting, President, Alan Wood Steel Company and Subsidiaries, Conshohocken, Pa.
- Mr. Cyrus N. Johns, President, American Chain and Cable Company, 929 Connecticut Avenue, Bridgeport 2, Conn.
- Mr. Weber W. Sebald, President, Armco Steel Corporation, 763 Curtis Street, Middletown, Ohio.
- Mr. R. S. Lynch, President, Atlantic Steel Company, P. O. Box 1714, Atlanta, Georgia.
- Mr. Luke E. Sawyer, President, Babcock and Wilcox Tube Company, Beaver Falls, Pa.
- Mr. Roy C. Ingersoll, President, Borg-Warner Corp., 301 South Michigan Avenue, Chicago 4, Illinois.
- Mr. Ernest G. Jarvis, President, Continental Copper and Steel Industries, Inc., 345 Madison Avenue, New York 17, New York.
- Mr. D. B. McLouth, President, McLouth Steel Corp., 300 S. Livernois, Detroit 17, Michigan.
- Mr. Ralph K. Clifford, President, Continental Steel Corporation, 1109 South Main Street, Kokomo, Indiana.
- Mr. F. R. S. Kaplan, President, Copperweld Steel Company, 39 Teilfeld Street, Glassport, Pa.
- Mr. John M. Curley, President, Eastern Stainless Steel Corp., 122 Rolling Mill Avenue, Baltimore 3, Md.
- Mr. K. D. Mann, President, Firth Sterling Steel and Carbide Corp., 3115 Forbes Street, Pittsburgh 13, Pa.
- Mr. Marcus A. Follansbee, President, Follansbee Steel Corp., 3rd and Liberty Ave., Pittsburgh 22, Pa.
- Mr. John N. Marshall, President, Granite City Steel Com-

pany, Hamilton & Randolph Streets, Granite City, Illinois.

Mr. George R. Fink, President, Great Lakes Steel Corp., Tecumseh Road at Fink, Ecorse, Detroit 18, Michigan.

Mr. M. J. Zivian, President, Detroit Steel Corp., 1025 South Oakwood Ave., Detroit, Michigan.

Mr. J. C. Cairns, President, Stanley Works, 195 Lake Street, New Britain, Conn.

[fol. 44] Mr. George R. Fink, President, Harina Furnace Corporation, Walbridge Building, Buffalo, New York.

Mr. Hector Boiardi, President, Boiardi Steel Company, 400 Lower Market Street, Milton, Pa.

Mr. Robert B. Heppenstall, President, Heppenstall Company, 4624 Hatfield Street, Pittsburgh, Pa.

Mr. Clarence B. Randall, President, Inland Steel Company, 38 S. Dearborn Street, Chicago 3, Illinois.

Mr. C. L. Hardy, President, Joseph T. Ryerson & Son, Inc., Box 8000-A, Chicago 80, Illinois.

Mr. E. L. Clair, President, Interlake Iron Corporation, 1910 Union Commerce Building, Cleveland 14, Ohio.

Mr. Bentley S. Handwork, President, Joslyn Manufacturing & Supply Company, 20 N. Wacker Drive, Chicago, Illinois.

Mr. M. L. Joslyn, President, Joslyn Pacific Company, 5100 District Blvd., Los Angeles 11, Calif.

Mr. W. W. Saxman, Jr., President, Latrobe Electric Steel Company, 1944 Haller Street, Latrobe, Pa.

Mr. E. M. Lavino, President, E. J. Lavino & Company, 1528 Walnut Street, Philadelphia, Pa.

Mr. Charles Lukens Huston, Jr., President, Lukens Steel Company, 1949 Gillen Street, Coatesville, Pa.

Mr. Frank S. Gibson, Jr., President, Newport Steel Corp., 1501 Beard Avenue, Detroit, Mich.

Mr. H. L. Goetz, President, Northwest Steel Rolling Mills, Inc., 4315 9th N.W., Seattle, Washington.

Mr. Paul W. Dillon, President, Northwestern Steel & Wire Company, 1927 Griswold Street, Sterling, Ill.

Mr. Jos. Eastwood, Jr., President, Pacific States Steel Corporation, Nathan Square Building, Oakland 12, California.

Mr. J. H. Hillman, Jr., Chairman of Board, Pittsburgh

Coke & Chemical Co., 1970 Grant Building, Pittsburgh 19, Pa.

Mr. T. M. Evans, President, H. K. Porter Company, Inc., 1932 Oliver Bldg., Pittsburgh 22, Pa.

Mr. A. J. Krantz, President, Reeves Steel Mfg. Co., 137 Iron Avenue, Dover, Ohio.

Mr. Charles R. Tyson, President, John A. Roebling's Sons Company, 640 South Broad Street, Trenton, New Jersey.

Mr. Nathaniel D. Devlin, President, Rotary Electric Steel Company, Box 90, Detroit 20, Michigan.

Mr. Ralph L. Gray, President, Sheffield Steel Corporation, Sheffield Station, Kansas City 3, Missouri.

Mr. Wm. P. Snyder III, President, Shenango Penn Mold Company, 812 Oliver Building, Pittsburgh, Pa.

[fol. 45] Mr. E. H. Taylor, President, Taylor Forge & Pipe Works, P. O. Box 485, Chicago 90, Illinois.

Mr. Edward L. Stockdale, President, Universal Cyclops Steel Corporation, Bridgeville, Pa.

Mr. R. C. McKenna, President, Vanadium Alloys Steel Company, Latrobe, Pa.

Mr. Stephen B. Minton, President, Vulcan Crucible Steel Company, 1 Main Street, Aliquippa, Pa.

Mr. John L. Neudoerfer, President, Wheeling Steel Corporation, 1134 Market Street, Wheeling, W. Va.

Mr. B. C. Coleord, President, Woodward Iron Company, Woodward, Alabama.

Mr. E. J. Hanley, President, Allegheny Ludlum Steel Corporation, Oliver Building, Pittsburgh 22, Pa.

Mr. L. F. Rains, President, A. M. Byers Company, 717 Liberty Avenue, Pittsburgh 30, Pa.

[fol. 46]

AFFIDAVIT

COUNTY OF ARLINGTON,
Commonwealth of Virginia:

Robert A. Lovett, being duly sworn, deposes and says that he is the Secretary of Defense of the United States and is the principal assistant to the President in all matters relating to the Department of Defense, and under the direction of the President, he has direction, authority, and control over the Department of Defense, including the De-

partments of the Army, Navy, and Air Force, and the Munitions Board.

Pursuant to these statutory duties and in the exercise thereof, he has information relating to the problems of procurement, production, distribution, research, and development concerning the logistics requirements of the armed forces of the United States in weapons, arms, munitions, equipment, materials, and all other necessary supplies for the armed forces of the United States.

There exists a state of national emergency declared by the President on 16 December 1950. Communist aggression is forcing the free world to fight a limited war on the battlefield and an unlimited war of preparation and production.

United Nations armed forces, largely American, are today fighting a war with communist armies and air forces in Korea. The French are fighting communist forces in Indo-China. There is a constant threat of further communist military aggression in other areas. The men actually fighting communist forces have been armed for the most part by American industry, and they are relying on American industry to supply the weapons and munitions they need in daily combat.

[fol. 47] To meet this threat of further aggression, we have deployed military forces in Europe and elsewhere. Friendly nations have joined us and have assigned their own military units to hold the line alone and with our forces. The Russians are warned in the only language they understand that the free world stands united in its determination to remain free. These men on the line which may become the firing line at any time, have been armed by western industry, largely American, and they are relying on our industry to supply an essential part of the weapons and munitions they must have to defend themselves and all of us.

We and other nations are training large numbers of men to increase the forces already combat worthy and to replace those who have served their turn and done their duty. In our case this involves building the core of our nation's defense—a well trained home force fully equipped with modern weapons and equipment. The weapons and

equipment for this great training effort have come and must come largely from American industry.

The steel industry of the United States provides the basic commodity required in the manufacture of substantially all weapons, arms, munitions, and equipment produced in the United States. An adequate and continuing supply of steel is essential to every phase of our defense effort.

The cessation of production of steel for any prolonged period of time would be catastrophic.

It would add to the hazards of our own soldiers, sailors, and airmen and of other fighting men in combat with the enemy. It could result in tragedy and disaster.

It would prevent us from adequately arming the military forces now facing the enemy on uneasy fronts.

[fol. 48] It would seriously delay us in adequately training and arming their replacements and reinforcements, and in building the core of our nation's defense, our home force.

For economic and financial reasons our armament program has been "stretched out" approximately a year longer than our military men desired from a purely military point of view. A cessation of steel production at this time would add materially to the risk the stretch-out already entails, thereby increasing the "calculated risk" we are taking to an unjustifiable point.

We are now using, for production of military end items (guns, tanks, planes, ships, ammunition and other military supplies and equipment), the following percentages of our total national steel production:

Carbon Steel	13.5 percent
Alloy Steel	36.6 percent
Stainless Steel	32.4 percent
Super alloy Steel	84.0 percent

In addition to such direct military requirements, those activities directly and indispensably supporting our military effort, such as the atomic energy, petroleum, power, and transportation programs and the program for broadening our industrial base and increasing our war potential, require many millions of tons of steel.

Considerations of national security make it impossible to state publicly the breakdown of use of various types of steel in manufacture of different military weapons and equipment. A few examples which can be given will show [fol. 49] the crisis which a steel shut-down would produce. For instance 35 percent of national production of one form of steel is going into ammunition for the use of our armed forces and 80 percent of such ammunition is going to Korea.

Since World War II the armed forces have made great progress in increasing the fire power of combat units: the fire power of an infantry division is 50 percent greater today than it was in World War II. We have substituted, insofar as possible, such fire power for manpower.

Our combat techniques are designed to employ the industrial strength of the United States by the increased use of ammunition and other matériel so as to preserve and protect to the maximum extent possible the lives of our men.

We have authorized an increase in consumption rates per gun to the extent of 60 percent over World War II in certain all-important weapons, and we have equipped our troops with more artillery and with newly developed recoilless artillery weapons so that a few infantrymen now carry the heavy fire power formerly carried by a complete artillery unit.

Such techniques and objectives require a greatly increased use of steel.

Although Korean truce talks are in progress and the battle lines are relatively stable, our troops are still firing a very substantial volume of artillery ammunition. There has been a tremendous decrease in the number of our casualties in Korea. We are holding the line with ammunition and not with the lives of our troops.

[fol. 50] Moreover, a sudden and large-scale resumption of combat in Korea may occur at any time; in such case the demand for ammunition as well as many other types of munitions could vastly increase.

Another specific example of a critical shortage is in stainless steel. Fifteen percent of all stainless steel produced in the United States is used in the manufacture of airplane engines, including jets. No jet engine can be manufactured without substantial quantities of high-alloy steels.

Therefore, any curtailment in the production of steel even for a short period of time will have serious effects on the programs of the Department of Defense which are essential to national security. A work stoppage in the steel industry will result immediately in serious curtailment of production of essential weapons and munitions of all kinds; if permitted to continue, it would weaken the defense effort in all critical areas and would imperil the safety of our fighting men and that of the Nation.

(Signed) Robert A. Lovett, Secretary of Defense.

Subscribed and sworn to before me this 14th day of April 1952. (Signed) Ralph N. Stohl, Notary Public. My commission expires January 1, 1956.

[fol. 51] CITY OF WASHINGTON,
District of Columbia, ss:

AFFIDAVIT

The undersigned, being first duly sworn, deposes and says:

1. He is Chairman of the United States Atomic Energy Commission.
2. The Atomic Energy Commission is currently engaged in a construction program involving a major expansion of its facilities authorized by the President and the Congress for the production of fissionable and other materials for atomic weapons.
3. This expansion program includes the construction of major facilities at Savannah River, South Carolina; Paducah, Kentucky; Fernald, Ohio, and other places.
4. The scope of this program and the target dates for completion of its integral parts are governed by production goals for atomic weapons established by the President to fulfill the requirements of the Armed Forces in the interest of the national security.
5. Our facilities construction program must be completed on schedule in order to meet the established weapon-production goals.

6. Completion of construction of these production facilities on schedule will be difficult in any event because:

a. The unique and unorthodox nature of most of these facilities presents complex design and procurement problems not usually found in more conventional types of plants.

b. Time already lost through schedule slippages attributable to delivery delays must be recovered.

7. The requirements of AEC's construction projects include virtually all types and kinds of steel including special forms of structural steel for buildings and substantial quantities of stainless steel for process equipment. These requirements include steel for structures and specially fabricated equipment and also for such items of specialized and standard manufacture as pumps, valves, compressors, heat exchangers, piping, heavy electrical equipment, tanks, and the like.

8. Inventories of steel and other critical products at the AEC construction projects are generally abnormally low for projects of such magnitude. Consequently, any cessation of deliveries of steel to the sites of AEC construction projects or to the manufacturers of equipment for such projects is likely to result in delays in the completion of these projects. A protracted cessation of deliveries of steel would certainly result in delays in the completion of these construction projects which could not be made up.

9. The critical effect of this situation on the production schedules of the AEC is evidenced by the fact that the National Production Authority, in addition to regular priority assistance on all AEC orders, is issuing daily special directives to insure delivery of various steel orders on accelerated and abnormal schedules in order to prevent delay to AEC projects. There are literally dozens of such directed orders currently outstanding which will delay the most urgent portions of the Commission's program of construction if steel is not furnished as required.

10. The ultimate effect of delayed completion of production facilities will inevitably be reflected in AEC's inability to step up the production of weapons to the rate required to meet the goals established by the President.

11. The undersigned further deposes that the foregoing statements are true to the best of his knowledge and belief.
(S.) Gordon Dean.

Subscribed and sworn to in my presence this 9th day of April 1952. (S.) John L. Cook, Notary Public.
My commission expires December 31, 1952.

[fol. 53] CITY OF WASHINGTON,
District of Columbia, ss:

Manly Fleischmann, being duly sworn, deposes and says:

1. I am Administrator of the Defense Production Administration, an agency of the Government of the United States established by order of the President on January 3, 1951 (Executive Order 10200).

2. As Defense Production Administrator I am charged by the President to "perform the central programming functions incident to the determination of the production programs required to meet defense needs" and to "make determinations as to the provision of adequate facilities for defense production."

3. The central programming function for defense production requires the measurement of the total supply of materials, including steel, against the total requirements for those materials of both defense and civilian production.

4. The total supply of steel normally available to the United States is substantially less than the estimated requirements for defense and civilian production.

5. The disparity between supply and requirements has required the limitation of use of steel by action taken under the Defense Production Act of 1950, as amended, in order to assure the accomplishment of military production, defense-supporting production and essential civilian production.

6. A shutdown of steel production in the United States would immediately interfere with military production which is currently requiring better than 20% of our entire steel output.

7. A shutdown of steel production in the United States would immediately impair essential civilian production and the maintenance of the industrial economy of the United States.

[fol. 54] 8. There are no alternative sources of supply adequate to the maintenance of military or essential civilian production in the event of stoppage of current steel production in the United States.

9. The continued production and fabrication of steel and the elements thereof is necessary to the national defense.

(S.) Manly Fleischmann.

Sworn to before me this 9th day of April, 1952. (S.)

Gertrude O. Higdon, Notary Public, D. C., General Accounting Office, 441 G St. N. W. (Seal.)

[fol. 55] CITY OF WASHINGTON,
District of Columbia, ss:

AFFIDAVIT

Henry H. Fowler, being duly sworn, deposes and says:

1. I am the Administrator of the National Production Authority, an agency of the Government of the United States, established by order of the Secretary of Commerce on September 11, 1950, under the authority of Executive Orders Nos. 10161 and 10200 and delegations of the Defense Production Administrator pursuant thereto.

2. As Administrator of the National Production Authority, I am charged with the performance of all priorities and allocations functions under Title I of the Defense Production Act of 1950, as amended, which have been conferred upon the Secretary of Commerce by the Executive Orders and delegations stated in paragraph 1 hereof.

3. The priorities and allocations functions conferred upon me pertain to all materials and facilities not otherwise conferred upon other agencies of the Government of the United States by the Executive Orders and delegations stated in paragraph 1 hereof.

4. In the performance of these functions, it is my responsibility to be currently informed of the productive capacity of the iron and steel industry and related industries, and of

the iron and steel requirements of those industries for which the National Production Authority acts as claimant agency.

5. Products of the iron and steel industry are indispensable in the manufacture of military weapons and equipment, and in the production of many items required for defense-supporting programs, including construction programs of the Department of Defense and the Atomic Energy Commission, the construction and expansion of power plants and of steel and aluminum facilities, and the production of railroad equipment, ships, machine tools, and the like. In the month of February 1952, the total tonnage of iron and steel products shipped by the iron and steel industry [fol. 56] for all uses was approximately 6,400,000 tons, of which it is estimated that 936,000 tons were shipped for direct Department of Defense and Atomic Energy Commission uses. Although complete figures for later months are not presently available to the National Production Authority, information which is available indicates some increases in these tonnages. In addition to the steel shipments made for the use of the Department of Defense and the Atomic Energy Commission, substantial quantities of steel are required for the defense-supporting programs, such as those mentioned above.

6. The statements contained in this paragraph 6 are made upon information and belief based on my continuous and almost daily personal contact as Administrator of the National Production Authority with the heads of the various material and product divisions of the Authority. In my capacity as Administrator, I receive frequent reports from the heads of said divisions relating to available material supplies, including iron and steel, and the material requirements of the military and defense-supporting programs, and, in addition, I am in frequent consultation with the heads of other Government defense agencies, particularly the Defense Production Administration, with respect to the problem of producing and distributing critical materials, including iron and steel, in sufficient quantities to meet the requirements for military and defense-supporting purposes on schedule.

(a) I estimate that the total tonnages of iron and steel products which would otherwise be available for all pur-

poses, including defense and defense-supporting programs, would be reduced by approximately 90 percent, in the event that the threatened strike or work stoppage mentioned in the Executive Order of the President, dated April 8, 1952, has taken place. Information is not presently available to indicate the particular shapes and forms of steel products and the particular steel alloys the production of which would not be interrupted by said work stoppage. The statements as to the disruptive effects of the stoppage as set forth below are subject to the qualification that they would be alleviated to the extent that the productive capacity of the operating iron and steel mills could be used to meet the requirements of a particular program.

(b) Complete information is not available to me with respect to inventories of materials and components in the hands of manufacturers of products required for the military and defense-supporting programs. A considerable number of these manufacturers do not have available in inventory balanced supplies of the shapes and forms of steel necessary for continuation of their production schedules over a substantial period of time. Consequently, although many of them would be able to operate for a period of time following said work stoppage, deliveries of end products and components would quickly diminish in volume and gradually comes to a halt. This situation would be more acute in the case of companies with lower, or greater imbalance in inventories.

(c) Said work stoppage would result in an immediate slow-down in the planned production of certain types of ammunition for the Armed Forces. The manufacturers of such ammunition do not have significant inventories of the types of steel used in such production because this usage is being rapidly accelerated. A similar situation prevails with respect to certain essential programs of the Atomic Energy Commission which depend on small, but vital, production of specialty items which are in critically short supply. If continued for a period as long as eight weeks, I believe that such a stoppage would paralyze the production of substantially all military weapons and equipment incorporating steel materials and components and also of many products and components incorporating steel materials required for the defense-supporting programs.

(d) In the field of general industrial components which are extensively used in both military and defense-supporting programs, the disruption caused by said work stoppage would be immediate and serious with respect to some items and more remote, but equally certain, with respect to others. The production of anti-friction bearings, mechanical power transmissions, and aircraft fasteners would be quickly affected due to the absence of significant steel inventories in the hands of many producers of these items. A disruption of the flow of these components would cause an immediate curtailment and a shutdown at an early date of the production of aircraft, tanks and other military equipment for which these components are required. Some of the manufacturers of such military equipment do not have on hand significant inventories of the components mentioned. The production of steel valves would also be immediately affected by such stoppage which would cause a disruption in construction programs of the Atomic Energy Commission and in the essential industrial expansion programs for which a substantial supply of steel valves is requisite.

(e) The production of heavy power equipment, such as engines and turbines, and of electrical equipment, such as motors and controls, switch gear and power transformers, would be immediately affected by said work stoppage due to the absence of balanced inventories of steel products in the hands of some manufacturers of such equipment. While a number of the manufacturers in this field would be able to continue production for a period of time, I estimate that shipments of such equipment would be discontinued by the manufacturers within one to three weeks after such stoppage. I estimate, with respect to the producers of engines and turbines, that even a one week's stoppage would cause as much as one month's delay in the production of engines and turbines because the producers of this equipment are presently operating under very tight delivery schedules and at full plant capacity. The loss of engine and turbine production would have serious effects upon the programs of the Atomic Energy Commission, the Navy's mine sweeper program, the power expansion program, and the aluminum and steel expansion programs.

(f) Said work stoppage would have an immediate and serious impact on the production of electronic equipment

used for military purposes. A stoppage of more than one week would result in substantial loss of production of such essential components as relays, synchros, servos, and similar type special components for military purposes. This is due to the fact that these items require special types of steels which the producers of these components have been able to acquire only in sufficient quantities to meet current production schedules. The limiting factor in the production of these components is final assembly and test and, since assembly and test facilities and all available technical personnel are presently being fully utilized, any loss in production is not recoverable. If there should be a loss in production of components for electronic equipment, there would be a corresponding loss in the production of the equipment itself since there are no significant inventories of components.

(g) Said work stoppage would seriously impede certain construction programs required to support the mobilization effort including facilities for the production of aluminum, steel, certain essential chemicals, urgently needed metal-working equipment, particularly machine tools, and aircraft, ships, tanks, guns, shells and guided missiles. These [fol. 60] construction projects will require a total of approximately 1,000,000 tons of steel for completion. All of these projects have a high degree of priority and any delay in completing them would set back the production schedules of military products urgently needed in the mobilization effort.

(Signed) Henry H. Fowler.

Subscribed and sworn to before me, this 14th day of April, 1952. (Signed) Ralph C. Barton, Notary Public, District of Columbia. My commission expires September 30, 1956. (Seal.)

[fol. 61]

AFFIDAVIT

CITY OF WASHINGTON,
District of Columbia, ss:

I, Oscar L. Chapman, being duly sworn, do depose and say:

1. I am Secretary of the Interior and I am making this affidavit on the basis of information obtained by the Department of the Interior in the performance of its functions.

2. The Secretary of the Interior bears the responsibility of assuring that adequate supplies of petroleum, petroleum products, and gas are available for the defense program and the essential civilian economy. The Petroleum Administration for Defense is the agency in the Department of the Interior through which this responsibility is discharged.

Recognizing that the United States and the free nations would be faced with a critical shortage of petroleum products in the event of an all-out war, the National Security Council has approved a world expansion program for the petroleum industry which will necessitate the use by the industry of large quantities of steel.

Despite the absolute necessity of increasing our petroleum reserves and oil transportation facilities and our refining capacity, material in forms critical to this program, such as oil country tubular goods, structural steel, and plate would not be made available during the second and third quarters and subsequent quarters in sufficient quantities to carry out the expansion program should there be [fol. 62] any substantial stoppage in deliveries of steel for even a short period of time.

A substantial stoppage in the production of steel would have drastic repercussions not only in retarding our present expansion program but would also delay important projects now under way. A slow-down in drilling operations due to the lack of oil country tubular goods would preclude the possibility of increasing our known reserves and would have an immediate effect on present production.

Many important oil lines are under construction and are contemplated, without which the transportation of petroleum from the wells to refining centers cannot be accom-

plished. Storage of petroleum products, not only for industries but for direct military use, will be delayed and our refinery expansion program will be seriously affected in the event of a nation-wide stoppage in the production of steel.

Included in the petroleum program is the expansion of facilities for production of aviation gasoline and alkylates which are presently in critically short supply and which will be vitally necessary in the event of a major war.

Similarly, the country has insufficient natural gas available in many consuming areas to meet present requirements for industrial production and other use. Our expansion program to build transmission facilities to these areas is now in the process of execution and will be seriously delayed [fol. 63] by a steel stoppage. Any serious interference with delivery of steel pipe will prevent a number of major gas pipe lines being completed in time for service during the winter of 1952-53, which would result in a serious deficit of supply. The total tonnage of steel already allotted for use in major gas pipe line projects, primarily in the second and third quarters of 1952, is 377,400 tons. These projects are expected to deliver to market during the next winter approximately 2,160,000,000 cubic feet of gas.

The Defense Production Administration has determined that the steel requirements of the oil and gas industries to be met through deliveries in the second quarter of 1952 are as follows:

Carbon Steel—1,595,888 tons

Alloy Steel—108,967 tons

Stainless Steel—4,886,687 lbs.

For the third quarter the Defense Production Administration has allotted to the petroleum and gas industries the following amounts of steel:

Carbon Steel—1,763,000 tons

Alloy Steel—140,000 tons

Stainless Steel—1,500,000 lbs.

These determinations are on the basis of urgent needs and clearly indicate the substantial quantities of steel required

in the next several months for the programs of the Petroleum Administration for Defense.

[fol. 64] 3. An adequate supply of electric power and adequate facilities for its transmission and distribution must also be provided if the defense program is to be successfully carried out and the needs of the essential civilian economy are to be met. The Secretary of the Interior is charged with the responsibility of assuring the availability of adequate supplies of electric power. This responsibility is discharged through the Defense Electric Power Administration, an agency in the Department of the Interior.

The electric utility industry is a substantial user of steel and steel products. The following table shows the requirements of the electric utility industry for steel that were presented to the Defense Production Administration by the Defense Electric Power Administration for the second and third quarters of 1952 and the allotments of steel actually made by the Defense Production Administration for the electric utility industry for those periods.

Second Quarter 1952

	Requirements (tons)	Allotments (tons)
Plate.....	65,351	44,500
Structural.....	196,658	148,500
Other carbon steel.....	168,772	138,105

Third Quarter 1952

	Requirements (tons)	Allotments (tons)
Plate.....	47,142	45,000
Structural.....	122,083	120,000
Other carbon steel.....	127,134	125,000

The shortage of steel has already resulted in delaying the power program. The Defense Electric Power Administration [fol. 65] in cooperation with the power industry has made substantial efforts to conserve steel. On June 22, 1951, it issued Industry Letter No. 2 to all electric utilities urging the substitution of wood poles in place of steel towers wherever possible. In general, however, there is no substitute for steel in the power program.

The principal use of steel in the power program is for generating stations. Approximately 80 percent of all steel allotted to the Defense Electric Power Administration is used in generating plants and more than 90 percent of steel plate allotted is used in generating plants. For the

remainder of the calendar year 1952 approximately four and one-half million kilowatts of new generation is scheduled for completion. A substantial share of the output of generating plants now under construction will be directly devoted to the atomic energy and military production programs.

Inability to obtain steel on time will delay almost every new generating station included in this program, as well as delaying the 1953 and later generating stations which are now under construction. Another serious problem raised by an inability to procure steel is the delay in delivery of boilers, generators, turbines, and other installed equipment. The boiler program in particular has already slipped to an extent that any further delays in boiler shipments will almost certainly result in failure to meet in-service dates of new generating stations. This is true with respect to almost every single steam-generating plant now under construction.

[fol. 66] The increase in power loads throughout the country due to the expansion of defense industries has reduced power supply margins to the point where curtailment of service to a number of defense industries is more than likely to occur. In the Pacific Northwest, the power shortage of September, 1951 resulted in a reduction of power deliveries for aluminum production. Under the most favorable circumstances of material availability, power supply margins will not be generally adequate throughout the country until 1954. The possibility of further defense production curtailments will therefore be substantially increased if the power program is retarded by a stoppage of steel supplies.

4. Coal, coke, and coal chemicals in adequate quantities are required for the defense program. The responsibility of assuring adequate supplies of these commodities also is a charge of the Secretary of the Interior. This responsibility is discharged through the Defense Solid Fuels Administration, an agency in the Department of the Interior.

The effect of nonoperation of the steel plants upon the program of the Defense Solid Fuels Administration for the solid fuels industries may be summarized as follows:

The construction of new coke ovens which are now in progress to meet the approved expansion goals of the defense mobilization program for the production of steel and

of coal chemicals and to overcome the high percentage of obsolescence of coke ovens will be curtailed unless structurals, plates and other steel components continue to be [fol. 67] available. Moreover, the continued production of coal chemicals, such as benzene and toluol for the manufacture of plastics, explosives, and pharmaceuticals, is of high strategic importance within the defense program.

Today 92.6 percent of underground bituminous coal is cut by machines, and 71 percent is mechanically loaded. Twenty-two percent of all bituminous coal is mined by stripping methods, which are substantially dependent upon the ready availability of steel supplies. Over 42 percent of coal is cleaned mechanically. In addition, coal mining requires large quantities of steel rail and pipe and of roof bolts and other safety equipment. A stoppage of steel production will seriously impair the availability of steel supplies for the maintenance, repair and operation of mines, and for the manufacture of mining machinery, repair parts, and other equipment which are indispensable to the production of coal.

The construction of new mines which are now in progress to meet the approved expansion goals of the defense mobilization program will be curtailed unless structurals and other steel components continue to be available.

Approximately 62 percent of coal consumption at coke ovens operated by steel companies is produced at coal mines that are captive to the steel industry, and approximately 38 percent of coal so consumed comes from commercial coal mines. Because of the necessity for balanced production and shipment, these commercial mines are dependent on [fol. 68] the continuous shipment of this coal to steel plants. Otherwise, these mines will become substantially inoperative and will be unable to ship the balance of their tonnage into other commercial markets.

The loss of steel supplies will result in a progressively severe decline in the production and availability of coal, which is vitally important to the health, economic welfare, and security of the Nation, including the generation of electric power, and the supply of energy to other industries that are vital to the national defense and to essential civilian requirements.

(Sgd.) Oscar L. Chapman, Secretary of the Interior.

DISTRICT OF COLUMBIA,
City of Washington:

Subscribed and sworn to before me this 9th day of April, 1952. (Sgd.) Alfred L. Pace, Notary Public in and for the District of Columbia. My Commission expires December 14, 1955. (Seal.)

[fol. 69]

AFFIDAVIT

CITY OF WASHINGTON,
District of Columbia, ss:

Jess Larson, being duly sworn, deposes and says:

1. I am the duly appointed Administrator of General Services, and, as such, am the head of the General Services Administration. I am also the duly appointed Defense Materials Procurement Administrator, and, as such, am the head of the Defense Materials Procurement Agency.

2. Among the functions and responsibilities of these two agencies are the following:

(a) The procurement of common-use items for the various agencies, including defense agencies, of the Federal Government.

(b) The construction, maintenance and repair of public buildings.

(c) The purchase of strategic and critical materials for the national stock pile established under the Strategic and Critical Materials Stock Piling Act.

(d) The encouragement of expansion of the production of materials necessary for the national defense and the purchase of such materials for Government use and resale, pursuant to the Defense Production Act of 1950, as amended, and the Executive Orders issued thereunder.

(e) The installation of equipment and facilities in [fol. 70] Government and privately-owned plants under the authority of the Defense Production Act of 1950, as amended, and said Executive Orders.

3. In the discharge of these responsibilities, the constant availability of steel in all forms is essential.

4. Steel production capacity existing at the outbreak of hostilities in Korea proved inadequate to meet defense and civilian needs. Consequently, the Government was compelled to place severe restrictions on various civilian uses of steel and to make every effort under authority of the Defense Production Act of 1950 to increase production facilities.

5. The Defense Production Administration has certified to Defense Materials Procurement Agency the necessity of greatly expanding the production of aluminum, copper, zinc, tungsten, manganese, molybdenum and other materials required for the national defense and essential civilian needs, by entering into contracts pursuant to which producers will expand existing facilities or create new facilities as rapidly as possible for such production. In carrying out such programs the availability of steel for new plants and plant expansion is absolutely essential. Steel is equally essential for the expansion of machine tool capacity and the production of new machine tools under a certified program being carried out by the General Services Administration. Stoppage of steel production will delay these expansion programs and will therefore seriously affect the ability of the General Services Administration and the Defense Materials Procurement Agency to perform their responsibilities in this field under the Defense Production [Vol. 71] Act of 1950, as amended.

6. In connection with the procurement of common use items for agencies, including defense agencies, of the Federal Government, the construction, maintenance and repair of public buildings, and the installation of equipment and facilities in Government and privately-owned defense plants, steel and many products containing steel are required. In view of the present shortage of steel, stoppage of production will seriously hinder, if not entirely stop, such procurement, construction, maintenance, repair, and installation.

7. In view of the circumstances described above, it is my opinion that stoppage of steel production will imperil the national safety and welfare as well as curtail immeasurably the performance of the critical and urgent statutory re-

sponsibilities of the General Services Administration and the Defense Materials Procurement Agency.

(Signed) Jess Larson, Administrator of General Services, Defense Materials Procurement Administrator.

Subscribed and sworn to before me this 9th day of April, 1952. (Signed) Madeline O'Brien, Notary Public. [Seal.] My commission expires August 1, 1952.

[fol. 72] AFFIDAVIT OF HOMER C. KING, ACTING ADMINISTRATOR DEFENSE TRANSPORT ADMINISTRATION

UNITED STATES OF AMERICA,
District of Columbia, ss:

Homer C. King being first duly sworn on oath deposes and says:

He is the Acting Administrator of the Defense Transport Administration and as such maintains his office in the City of Washington, District of Columbia. In his official capacity he is familiar with the domestic surface transport, warehousing and port facilities and services of the Nation and the Nation's needs therefor. In such capacity he is also familiar with the effects thereon of a shortage or cessation in the supply of iron and steel and iron and steel products necessary for the production and operation of such facilities.

The interruption in the production of iron and steel and iron and steel products used in the production of domestic surface transport facilities and warehousing and port facilities arising from the current labor dispute between the steel producers and their employees who are members of unions having membership in or affiliated with the Congress of Industrial Organizations (C. I. O.) will have the effects hereinafter mentioned upon domestic transport, warehousing, and port facilities and services.

Such interruption will materially reduce the production of vehicles used on the streets and highways for the transportation of property and passengers. Because of the mass

production method of manufacture of such vehicles, a continuous flow of steel is required daily. After a discontinuance in the supply of needed steel, production of such vehicles may continue for only a few days after which it will cease entirely. The producers of trucks and automobiles have been allotted controlled materials barely sufficient during the remainder of this year for replacement needs where as government agencies, including Defense Transport Administration [fol. 73] are endeavoring to promote an expansion of fleets of such vehicles in the hands of carriers sufficient to meet essential needs in the event of an emergency or all out war. Failure of production to maintain present fleets may be disastrous to the movement not only of critical defense or war materials but also essential products for the civilian economy. The eventual effect of such an interruption will be a curtailment in the volume of traffic handled by street and highway transport facilities; a cessation of operations of a large number of highway carriers engaged in the transportation of iron and steel products; and unemployment of employees engaged in such transportation.

Such interruption will delay current construction of warehousing facilities. Many projects involved in the construction of warehouses for agricultural commodities could not be completed in time for the 1952 harvest. This will require the movement of some grains to warehouses located at more distant points thus using additional transportation services, or the storage of grain on the ground with attendant loss.

Such interruption will retard new construction, conversion, and repair of port facilities.

It will result in shutting off the movement of steel scrap to the steel mills. When the operation of such mills is resumed, the gathering and shipping of scrap will also be resumed, but because of the interruption, such scrap may not come into the channels of movement to the mills in time to prevent serious delays in the production of steel.

When the steel mills are in full operation, tens of thousands of freight cars are used daily to transport scrap, limestone, ore, and coal into the plants. A lesser number of cars is required to move the finished products from the

plants. Closing of the steel mills will almost immediately immobilize the freight cars normally used in connection with this traffic. Another effect would be the closing of all captive coal mines with resultant reduction in train service. This in turn would necessitate a reduction in the maintenance-of-way forces and shop crews.

[fol. 74] The railroads in the Great Lakes area have begun to assemble equipment at Lake ports to handle coal and ore moving by vessels on the Great Lakes. Most of these cars would be stranded in the event of an interruption in iron and steel production. Some of the vessels used in the transportation of iron ore, coal, limestone, and other materials, on the Great Lakes would be completely tied-up as the crews of the vessels are members of the Steel-workers' Union involved in the aforementioned labor dispute. The Great Lakes iron ore fleet carried 89 million gross tons of iron ore in 1951—a new peacetime record. The iron ore target for the fleet is 96 million gross tons during the 1952 shipping season. This target cannot be met if there is any interruption in iron and steel production or in the operation of vessels on the Great Lakes.

The Great Lakes shipbuilding program as well as the United States barge and towboat building program would soon feel the effects of an interruption in iron and steel production. This would be particularly serious, if, as appears likely, steel obtained under the controlled materials plan for private industry were diverted to meet military needs as a result of such interruption.

The effect of a loss of steel tonnage as a result of a closing of the steel mills will be reduced production of freight cars and locomotives, reductions in the number of cars and locomotives repaired, in the replacement of rails, and in the repairs to structures. Present shortages of steel have already required curtailments in these programs. The present short supply of plates, bars, and structural steel will be intensified.

Homer C. King.

Subscribed and sworn to before me this 9th day of April, 1952. Lillian L. Coley, Notary Public. My commission expires January 31, 1955. (Seal.)

[fol. 75]

AFFIDAVIT

CITY OF WASHINGTON,

District of Columbia, ss:

Charles Sawyer, being duly sworn, deposes and says that

1. I am Secretary of Commerce of the United States and as such am vested among other powers and duties with the claimancy function under the Defense Production Act, as amended, with respect to priorities and allocations of materials in connection with construction, maintenance and repair programs in the transportation field as follows:

Bureau of Public Roads.—Programs for highway construction and maintenance, including urban streets, (whether Federally financed or not).

Maritime Administration.—Programs for coastwise, intercoastal and overseas shipping, and merchant ship construction and repair.

Civil Aeronautics Administration and Civil Aeronautics Board.—Programs for air navigation facilities, civil airports, new civil aircraft and concurrent spares for air carrier and non-air carrier aircraft and maintenance, repair and operation of equipment and facilities.

2. I have investigated the impact of a national stoppage in steel production on the transportation programs of these agencies, which are vital both to defense and essential civilian activities, and have determined that the impact would be as stated below:

EFFECT OF STEEL SHUTDOWN ON HIGHWAY PROGRAM

A. *Specific Program Affected.*—The highway program involves the rehabilitation of approximately 64,600 miles of highways in a 1-year period. It also includes the maintenance of the Nation's entire highway transportation system of 3,322,000 miles of roads under the control of approximately 18,000 State, city, county, and local governmental highway agencies and toll road authorities. The roads are [fol. 76] being rehabilitated and maintained for the safe and expeditious use of over 50 million motor vehicles operating on the highway plant to the extent of approximately 488 billion vehicle-miles per year.

Included within the highway systems are access roads to defense establishments and sources of raw materials, industrial access roads and the interstate system of highways, urban and rural. The interstate system is a limited mileage of highway routes directed by Congress to connect the principal metropolitan areas, cities, and industrial centers to serve the national defense. The Department of Defense has determined that this system of roads is of greatest strategic importance for service of the highway necessities of war.

B. Units of Production Affected—

1. Highway Construction Loss:

	Feet of bridge	Miles of highway
Essential work for which steel was requested in the second calendar quarter 1952.....	582,813	7,947
Essential work for which steel was allotted and which is under way in second quarter.....	370,000	6,000
10-day strike loss.....	96,000	1,500
20-day strike loss.....	149,000	2,280
30-day strike loss.....	196,000	2,950

The above estimate takes into account the lag which accompanies the strike and the probability that the Department of Defense and Atomic Energy Commission will obtain all the steel they require in the second quarter and that other claimants including the industrial expansion program will take proportionate losses. The highway construction program cannot continue production from inventory. Steel for highways and bridges is ordered for a specific use, delivered for a specific use, and if it is not produced and delivered, the program is delayed. In fact, nondelivery of one piece of structural steel may delay an entire project. The loss of steel production will also affect the availability of construction equipment and repair parts.

[fol. 77] *2. Highway Maintenance Loss:*

Approximately 300,000 major equipment units are stationed along the Nation's highways for road maintenance and traffic safety operations. This equipment requires repair parts made of steel. This is a representative example. Included within the equipment fleet are 50,000 motor graders requiring 51,000 tons of steel cutting edges per

year. This steel has been in short supply for some time and there are no accumulated inventories. For want of a steel cutting edge, a motor grader which can maintain 85 miles of farm-to-market roads becomes inoperative. A steel production stoppage for each of the following number of days will decrease the steel cutting edge supply for road maintenance in at least the following amounts:

	<i>Steel loss</i>
10-day strike	2,800 tons
20-day strike	4,200 tons
30-day strike	5,600 tons

C. Effect of Dislocation that Accompanies Work Stoppage.—It is estimated that the loss of steel production occasioned by a strike would result in the following loss of employment:

	<i>Man-hours</i>
10-day strike	6,500,000
20-day strike	9,900,000
30-day strike	12,700,000

The above estimate includes only the labor loss on the highway project and does not include the man-hours lost by the fabricators of steel and the suppliers of other materials and services who are delayed by the nondelivery of steel to the job. Although there is some possibility that the highway construction contractor could and would absorb some of this labor on other work, the majority of the men affected would be laid off. After being laid off there is a strong possibility that they would find other work and would not be available to continue the highway work after the necessary steel became available. Additional time would be necessary to reassemble an adequate working force.

[fol. 78] *D. General Discussion.*—Highway construction has a broad scope of influence on the economy of the Nation affecting highway transportation in all areas of the United States. In illustration there is given below a description of three projects which will show clearly the importance of the construction work to Defense and the National economy:

Discussion of three specific highway projects:

Atlanta Expressway, Georgia—Project UI-536(2)-10

Northwest section of the Atlanta Expressway which serves as transportation facility for defense workers to the Lockheed Aircraft plant near Marietta, Georgia.

Newton-Southbury, Connecticut—FI-41(8) on U. S. Route 6

This route carries an average of 4,200 vehicles per day. It is the main route between Danbury and Waterbury and Hartford. This highway not only serves a large unit of State movement but also considerable intercity traffic. Defense workers and defense materials use this route to go to Danbury on the west and Waterbury and Hartford on the east.

With the new facility, the workers and defense materials will find a dependable highway facility to move safely and expeditiously. This will save time in going to work and also speed the flow of defense material.

Congress Street Expressway, Illinois—Project -261(9)

This is a major link in the arterial system of highways in the Chicago area and will not only accommodate passenger vehicles but also truck transport and mass transit, including a rapid transit rail facility carrying hundreds of thousands of workers to and from work daily. Industrial and passenger traffic will generate 100,000 vehicle-trips per day over the expressway.

[fol. 79] PARTIAL LIST OF HIGHWAY PROJECTS ALLOTTED STEEL
IN THE SECOND QUARTER 1952

There follows below a listing of a number of highway projects that have been allotted 250 tons or more of structural steel shapes. Because these materials are in short supply, these important projects are being continuously watched by the Bureau of Public Roads, Department of Commerce:

State	Project Identification
Connecticut.....	FI-41 (8) US 6 Newtown Southbury
Massachusetts.....	Fall River-Freetown Forest Hills Boston Lancaster-Leominster U-188 (21)
New Jersey.....	Brooklyn-Queens Expressway
New York.....	So. St. Elev. Highway Vernon Avenue Bridge HT-52-1 Nyack Bridge U1-50 (3)
Rhode Island.....	N-383-5-315 US240
Maryland.....	Lucas 120-3-46-FAU
Ohio.....	Akron Expressway FA-U Hamilton Beechmont Levée FA-U-416 (3)
Pennsylvania.....	Allegheny UI 797 (2) Cumberland US 111 Bucks US 2 LR 281-A Montgomery UI 981 (3) Delaware River Bridge Lancaster F813 (2) F167 (10) Allegheny U794 (5) Beaver 18 Homewood Indiana-West US 22 Indiana-US 119 Lancaster-US322 Crawford US 6 & 19 Indiana 32003-2 Lehigh-Catasauqua Bridge McKean S-601 (2) S 102 (2)
Virginia.....	UI 203 (9)
West Virginia.....	UG-316 (2) Jefferson
Alabama.....	7202-275 b
Florida.....	FG-002-2 (6), (7), (8) 1517-7 179
Georgia.....	FI-009-2-(6) UI-536(2)-10 Toll Proj. No. 1
[fol. 80] Mississippi.....	R-9359 & R-9464 Shelby
Tennessee.....	Chicago Pk. Dist. 23 St. Via Ill. Proj. 261 (9) Cook County Sec. 044-0505.2 Chicago Pk. Dist. Outer Driver Ind. Proj. RI 69 (24)-3390 FI-75 (11)-3431 U-724 (6) 3393
Illinois.....	B-31 & 32 of 82-22-10
Michigan.....	Juneau Ave. Bridge FO3-1 (23)
Wisconsin.....	Van Buren SN-737 Wapello WER-39 (1)
Iowa.....	UI-892 (5) City of St. Louis F-176 (10) Group 66 Phelps City
Missouri.....	6316-5-FI-522 (1)
Arkansas.....	UGI 832 (9) Dallas City F158 (10) Hemphill County Harris County Stacosita Rd.
Texas.....	VII-VEN-FAS-876 52-14 DO7-P VII-LA-166 A 52-7 VC 17-F VII-LA26 ALH. MON P, E. 52 VII-LA26 E 52-7BC 30F VII-LA 2 LA 2 LYN St. City of Los Angeles
California.....	S-77 (2) Plate
Montana.....	Indust. Waterway in Tacoma
Washington.....	

[fol. 81] Effect of Steel Shutdown on Shipbuilding Program

The current building program of ocean-going ships for which the Maritime Administration, Department of Commerce, is responsible, consists of 35 Mariners (20 knot, 12,700 deadweight tons, cargo ships), 58 tankers, 3 transports, 1 ore carrier, and 1 superliner. These ships are in varying degrees of construction, the most recent contracts calling for delivery as late as mid-1955. Of the 98 ships mentioned herein, there is sufficient steel in the building yards to permit completion of 21 of the ships (including the 3 transports, the ore carrier, and the superliner). Thirty-nine ships are in that stage of construction as to be directly dependent on the receipt of steel products during the present quarter. It is for these ships that the Maritime Administration has received an allocation of 117,000 tons of carbon steel for the second quarter 1952. The remaining 38 ships are scheduled for later construction and do not require steel at this time.

The units of production immediately affected by a lack of steel would be the 39 ships under active erection (19 Mariners and 20 tankers). The Mariner is a new type, fast cargo ship designed especially in the course of preparation for adequate defense to cope with the submarine menace. The annual cargo capacity, under average conditions, of the 19 Mariners, is approximately 3,100,000 tons of cargo to be moved at a speed of 20 knots, a cargo service not hitherto available to the United States in time of emergency. The 20 tankers that would be affected are also new high-speed vessels with an average annual capacity of 9,400,000 tons of cargo.

Under the assumption that the steel mills have been and, after the stoppage, will be operated at full capacity, it appears that the delays in the shipbuilding program for these 39 ships would not be less than the number of days the steel mills are shut down.

[fol. 82] Much of the lost time could not be regained by the shipyards ever by making full use of all materials now on hand. Such a use of materials would, however, involve changes in established erection schedules so that efficiency would be substantially decreased and costs would be increased.

If the stoppage of steel production were for as extended a period as 30 days, there would be an effect on subsequent programs scheduled to make use of the construction facilities when the facilities are cleared of the ships which now occupy them. Hence, the 38 ships scheduled for later construction would find that materials and facilities will not be available to permit the ships to be started in accordance with current schedules. Both types of delay would directly affect the preparedness program by depriving the nation of the use of fast, efficient ships of the latest type.

Three of the major shipbuilding yards engaged on the current Maritime Administration program have sizeable shipbuilding contracts from the Department of the Navy and delays in the Maritime Administration program will inevitably cause corresponding delays in the program for the Department of the Navy and vice versa.

If the work stoppage due to lack of steel were for a period as long as 30 days, there would be an adverse effect on the labor force and on shipyard organization. The shipyards have experienced difficulty in building up their working force of skilled labor consisting of riggers, pattern makers, riveters, plumbers, pipefitters, boilermakers, etc., and any stoppage would cause many of these employees to leave the area or seek other employment. Considerable time will be necessary to recruit and reorganize a labor force. It seems that this adverse effect would be more or less in proportion to the duration of the work stoppage.

The above discussion is limited to the work in the shipyards proper. If we assume that component manufacturers have received their steel in approximately the same proportions as the shipyards, then the delays which will be experienced by the component manufacturers will be about the same as the delays experienced by the shipyards.

[fol. 83] Effect of Steel Shutdown Strike on Aeronautical Transportation Programs

(A) *Specific Aeronautical Transportation Programs Affected.*—Programs here discussed with regard to the effect

of a possible steel strike on aeronautical transportation programs are:

(1) *Air Carrier Production Program*, involving the manufacture of 439 civil transport aircraft by Martin, Douglas, Lockheed, Convair and Sikorsky, scheduled for delivery to the U. S. air carriers and foreign air carriers during the succeeding 10 quarters.

(2) *Non-Carrier Aircraft Production Program*, involving the manufacture of 9,211 civil aircraft scheduled for delivery over the next three years.

(3) *Maintenance of civil air carriers* which involves the repair and maintenance of approximately 1,300 transport type aircraft now engaged in air transportation in the United States.

(4) *U. S. Airport Construction Program*, involving new construction, improvements and enlargement of approximately 6,000 airports located within the United States.

(B) *Units of Production Affected.*—

(1) *Air Carrier Aircraft Production Program*: Except for a small number of steel items which are already in short supply, it is considered that there is sufficient material on hand in the form of fabricated parts, inventory and steel-in-shipment to maintain the production lines on the first 182 civil transport aircraft which are now in the process of being produced for delivery in the second, third and fourth quarters of 1952. For this reason, any strike for a period of ten to thirty days would affect the delivery of the balance of the 439 aircraft; namely, 247 now on order for delivery during 1953 and 1954. Normal lead times for material for delivery during the time of the threatened strike would cause these aircraft to be affected. Some companies indicate that steel shortages would therefore likely cause a shutdown by the end of 1952.

[fol. 84] The 182 aircraft may also be affected to some degree by those items already in short supply. For example, the case of stainless steel exhaust stacks for transport type aircraft which depend on material produced by the steel industry, has, because of nickel shortages, become a number one problem even without a strike. Should the production of these components be delayed, it is anticipated

that both the Convair and Douglas production lines would have to be stopped within sixty days. This situation applies to many other small components.

(2) *Non-Carrier Production Programs*: To a large extent, a steel strike will affect the non-carrier production program in the same manner as it affects the manufacture of transport aircraft discussed above, with the exception that the lead times are shorter and the delays in production will be experienced sooner. It is considered that a strike, whether ten days or thirty days, would probably not be felt on an over-all production for a period of four months, and the length of the delay or shutdown of the manufacturing facilities would be in direct proportion to the length of the strike. Based on the present inventory position and the goods in process, it is estimated that 2160 aircraft scheduled for delivery in the second and third quarters of 1952 will not be affected. However, the balance of the 9211 aircraft; namely, 7043 airplanes, would be affected. These aircraft are now being produced at a rate of 3500 per year are the minimum considered necessary to maintain the existing fleet of 48,000 non-carrier type aircraft now used in essential civil activities, such as crop dusting, forestry patrol, executive and industrial transport and similar essential activities.

(3) *Maintenance of Civil Air Carriers*: Civil aircraft, foreign and domestic, use approximately 150 tons of carbon steel, 40 tons of alloy steel, and about 150,000 pounds of stainless steel per quarter. The inventory position of the airlines is generally 30 to 40 days, depending upon the availability of warehouse stocks. Except for some items, which are already in short supply, such as the exhaust stacks for Douglas DC-6 and Convair 240 aircraft, which are now in operation in the civil fleet, it is anticipated that the strike would affect the operation of air carriers within [fol. 85] a period of 30 to 45 days. In some instances, however, the failure to get component parts, already in short supply, might subject the fleet to grounding within a very few weeks.

(4) *U. S. Airport Construction Program*: The maintenance, expansion and development of the civil airports in the U.S. involve the allocation of 12,578 tons of carbon steel

in the second quarter, 1952. This total includes 5623 tons of structural steel. The delay in this steel will affect 127 airport construction projects divided as follows:

- 35 direct military requirements for joint-use airports
- 24 military connected civil requirements projects
- 68 urgent civil transportation construction projects.

As all of these projects have steel allotments for the second quarter of 1952, any delay which would be reflected in production during that period would adversely affect these projects.

(C) *Effect of Dislocations that Accompany Work Stoppages Due to Lack of Steel.*—All aircraft manufacture is of a production line nature. Therefore, any item in short supply would affect the entire production operation. A steel shortage, though there may be an abundance of aluminum or magnesium parts available, would sooner or later require the entire line to stop and have a direct effect on the fabrication of the other components, making it impossible to continue the balance of the operation. It is therefore considered that the steel shortage could tie up the entire production effort within the times discussed earlier. Although only a small percentage of the total weight of aircraft is steel, the entire production process is keyed to the steel supply. The time period needed to readjust the labor forces and to get the production underway again would in many instances require several times the number of days of stoppage in steel production.

[fol. 85A] (D) *General Discussion of the Effects Peculiar to the Aircraft Production Program.*—The manufacture of aircraft is a complicated procedure requiring highly skilled labor. If the higher priority military programs are given such steel that may be available, the aircraft companies sooner or later will be required to close, and no doubt the resulting effect would be that this labor once lost would never return to the civil aircraft producers as the same type of labor is used, of course, for military aircraft as well as the guided missile program.

Also, the direct effect of a delay in the program as discussed previously may cause a work stoppage from 60 to 90 days after the strike is commenced, and may vary in length.

of stoppage in proportion to the length of the strike. However, one manufacturer of aircraft has indicated that this operation is so sensitive to the steel situation that it would be preferable to close down his operations immediately rather than wait for a number of small items to cause him to close.

The present mobilization plan contemplates immediate transfer of a large percentage of the present air carrier fleet to the military service. Any delay in the aircraft on order or the maintenance of existing fleet would adversely affect the preparedness program in which the air carrier fleet plays a major part as first line standby reserve.

Charles Sawyer.

Subscribed and sworn to before me this 14th day
April, 1952. Francis B. Myers, Notary Public. My
Commission Expires April 14, 1954.

[fol. 86]

AFFIDAVIT

CITY OF WASHINGTON,
District of Columbia, ss:

Harry Weiss, being duly sworn deposes and says:

That he is the duly appointed Executive Director of the Wage Stabilization Board; that in the regular course of business all of the administrative work relating to the disputes functions of the Wage Stabilization Board (hereinafter referred to as the Board), is performed under his supervision and that appropriate official dockets and records are made of any such work; that the official dockets and records of the disputes between the United Steel Workers of America, CIO (hereinafter referred to as the Union) and various steel and iron ore companies, reveal that:

(1) These disputes were referred to the Board by the President of the United States, in accordance with the terms of Executive Order 10233, on December 22, 1951. A copy of the letter of reference, dated December 22, 1951, and addressed to Mr. Nathan P. Feinsinger, Chairman of the

Board, is attached hereto. In addition to the letter of reference, the President of the United States transmitted a statement explaining the relation of these disputes to the defense effort. A copy of that statement, dated December 22, 1951, is also attached. Subsequently, on December 24 and December 29, 1951, by direction of the President, lists of the companies involved in the disputes, referred to in the President's letter of December 22, 1951, were transmitted to the Board. Copies of the transmittal letters and lists are attached.

Upon receipt in the Disputes Office of the Board, the documents relating to these disputes were officially docketed and identified as "Case D-18-C".

(2) Immediately upon receipt of the President's letter of referral, the Board, through its Chairman, Nathan P. Feinsinger, requested the Companies to maintain normal work and production schedules, and the Union to instruct its members to remain at work while the matter was before the Board. The parties agreed to this request. Copies of the [fol. 87] telegrams from the Board making this request and several typical replies are contained in Appendix I of the "Report and Recommendations of the Wage Stabilization Board", a copy of which is attached.

(3) The Board, on January 3, 1952, appointed a tripartite special steel panel consisting of Dr. Harry Shulman, Chairman and Public Member; Ralph Seward, Public Member; John C. Bane, Jr., Esq., and Admiral Earle W. Mills, Industry Members; and Mr. Arnold Campo and Mr. Eli Oliver, Labor Members; to hear the evidence and arguments in the disputes involving the steel producing and fabricating companies and to make such reports thereon as the Board might direct. The Board, on January 7, 1952, met with the parties in a procedural meeting.

(4) The special tripartite panel appointed by the Board held public hearings beginning in Washington, D. C. on January 10 to 12, 1952, and in New York City on February 1 to February 16, 1952. The parties were afforded an opportunity to present evidence and arguments on all of the issues in dispute. A list of the parties who participated in the proceedings before the panel is contained in Appendix III of the "Report and Recommendations of the Wage Stabilization Board", a copy of which is attached.

(5) In accordance with instructions from the Board, the panel prepared a report dated March 13, 1952, outlining the issues in dispute (except the issue as to the Union's request for a union shop and a guaranteed annual wage) and summarizing the positions of the parties. This report was submitted to the parties for comment. A copy of that report is attached.

(6) On March 15, 1952, the Board again requested the parties to continue work and production to permit consideration of the report of the panel. Copies of the telegrams exchanged between the Board and the parties are included in Appendix IV of the "Report and Recommendations of the Board", a copy of which is attached.

[fol. 88] (7) During the period while the panel report was being prepared and afterwards, the Board met and considered the issues in dispute and prepared its report to the President and recommendations to the parties, dated March 20, 1952. A copy of that report is attached.

(S.) Harry Weiss.

Sworn to before me this 14th day of April 1952 at Washington, D. C. (S.) Virginia E. Crowder,
Notary Public. My Commission expires January 31, 1953.

[fol. 441] Letter dated December 22, 1951 from the President to Nathan P. Feinsinger (omitted in printing).

[fol. 444] Statement by the President, December 22, 1951 (omitted in printing).

[fol. 446] Letter dated December 24, 1951 from William J. Hopkins, Executive Clerk, the White House, to Nathan P. Feinsinger with attachments (omitted in printing).

[fol. 521] Panel Report No. D-18-C March 13, 1952 (omitted in printing).

[fol. 470] Report and Recommendations of the Wage Stabilization Board, March 20, 1952 (omitted in printing).

CITY OF WASHINGTON,
District of Columbia, ss:

Nathan P. Feinsinger, being duly sworn, deposes and says:

That he is the duly appointed Chairman of the Wage Stabilization Board; that he personally participated in the deliberations of that Board in the disputes between the United Steelworkers of America, CIO, and various steel and iron ore companies, identified as "Case D-18-C" in the official dockets and records of the Wage Stabilization Board; and that the recommendations of the Wage Stabilization Board to the parties to the disputes, contained in the report to the President of the United States dated March 20, 1952, are in his opinion fair and equitable and not unstabilizing and are within the jurisdiction and authority of the Wage Stabilization Board as conferred by Executive Order 10161, as amended by Executive Order 10233.

(S.) Nathan P. Feinsinger.

Sworn to before me his 14th day of April, 1952 at
Washington, D. C. (S.) Virginia E. Crowder,
Notary Public. My Commission expires January
31, 1953.

[fol. 232] UNITED STATES DISTRICT COURT FOR THE DISTRICT
OF COLUMBIA

Civil Action No. 1550-52

THE YOUNGSTOWN SHEET AND TUBE COMPANY, a Body
Corporate, Youngstown, Ohio, the Youngstown Metal
Products Company, a Body Corporate, Youngstown,
Ohio, Plaintiffs

vs.

CHARLES SAWYER, the Westchester, 4000 Cathedral Ave.
N. W., Washington, D. C., Defendant

Civil Action No. 1635-52

THE YOUNGSTOWN SHEET AND TUBE COMPANY, a Body
Corporate, Youngstown, Ohio, the Youngstown Metal
Products Company, a Body Corporate, Youngstown,
Ohio, Plaintiffs

vs.

CHARLES SAWYER, Secretary of Commerce, U. S., the West-
chester, 4000 Cathedral Ave., N. W., Washington, D. C.,
Defendant

Civil Action No. 1539-52

REPUBLIC STEEL CORPORATION, a New Jersey Corporation,
Plaintiff

vs.

CHARLES SAWYER, Westchester Apartments, Washington,
D. C., Defendant

Civil Action No. 1647-52

REPUBLIC STEEL CORPORATION, a New Jersey Corporation,
Plaintiff

vs.

CHARLES SAWYER, Secretary of Commerce, Department of
Commerce, Washington, D. C., Defendant

[fol. 233]

Civil Action No. 1732-52

E. J. LAVINO & COMPANY, a Delaware Corporation, Plaintiff

vs.

CHARLES SAWYER, Individually and as Secretary of Commerce of the United States of America, Washington, D. C.,
Defendant

Civil Action No. 1700-52

ARMCO STEEL CORPORATION and SHEFFIELD STEEL CORPORATION,
Plaintiffs

vs.

CHARLES SAWYER, Individually and as Secretary of Commerce of the United States of America, Defendant

Civil Action No. 1549-52

BETHLEHEM STEEL COMPANY, et al., Plaintiffs

vs.

CHARLES SAWYER, Individually and as Secretary of Commerce of the United States of America, Washington, D. C.,
Defendant

Civil Action No. 1581-52

JONES & LAUGHLIN STEEL CORPORATION, a Pennsylvania Corporation, Plaintiff

vs.

CHARLES SAWYER, Westchester Apartments, Washington, D. C., Defendant

Civil Action No. 1624-52

UNITED STATES STEEL COMPANY, Plaintiff

vs.

CHARLES SAWYER, 4000 Cathedral Ave. N. W., Washington, D. C., Defendant

[fol. 234]

Civil Action No. 1625-52

UNITED STATES STEEL COMPANY, Plaintiff

vs.

CHARLES SAWYER, Department of Commerce, Washington,
D. C., Defendant

John J. Wilson, John C. Gall, and J. E. Bennett, Esquires,
Attorneys for plaintiffs The Youngstown Sheet and Tube
Company and The Youngstown Metal Products Company.

Hogan and Hartson, by Edmund L. Jones and Howard
Boyd, Esquires; Gall, Lane and Howe, by John C. Gall,
Esquire; Jones, Day, Cockley and Reavis, by Luther Day
and T. F. Patton, Esquires, Attorneys for plaintiff Re-
public Steel Corporation.

James C. Peacock, Randolph W. Childs, and Edgar S. Mc-
Kaig, Esquires, Attorneys for plaintiff E. J. Lavino &
Company.

Breed, Abbott & Morgan, by Joseph P. Tumulty, Jr., Es-
quire; and Charles H. Tuttle, Esquire, Attorneys for
Plaintiff Arceo Steel Corporation.

Cravath, Swaine & Moore, by Bruce Bromley, Esquire; Wil-
mer & Brown, by E. Fontaine Brown, Esquire, Attorneys
for Bethlehem Steel Company.

Jones, Day, Cockley and Reavis, by Sturgis Warner, Es-
quire; H. Parker Sharp, Esquire; Reed, Smith, Shaw &
McClay, by John C. Bane, Jr., and Walter J. McGough,
Esquires, Attorneys for plaintiff Jones & Laughlin Steel
Corporation.

Davis, Polk, Wardwell, Sunderland & Kiendl, by John W.
Davis and Theodore Kiendl, Esquires; Covington &
Burling, by John Lord O'Brian and Howard C. West-
wood, Esquire; and Roger M. Blough, Esquire, Attorneys
for plaintiff United States Steel Company.

Holmes Baldridge, Esquire, Assistant Attorney General of
the United States, and Marvin Taylor, Esquire, Assistant
Attorney General of the United States, Attorneys for
defendant.

[fol. 235]

OPINION—Filed April 29, 1952

By Executive Order 10340, promulgated April 8, 1952, the President of the United States directed defendant to take possession of such plants of companies named in a list attached thereto as he deemed necessary in the interests of national defense, to operate them or arrange for their operation, and to prescribe the terms and conditions of employment under which they should be operated. The plaintiffs are among those named in the list. In the recitals of the Executive Order, the President stated that a controversy had arisen between certain companies producing and fabricating steel and certain of their workers represented by the United Steel Workers of America, C. I. O., regarding terms and conditions of employment; that the controversy had not been settled through the processes of collective bargaining or through the efforts of the Government, and a strike had been called for April 9, 1952; that a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression; and that in order to insure the continued availability of steel it was necessary that the United States take possession of and operate the plants. By virtue of this Executive Order, defendant issued his Order No. 1 bearing the same date, stating that he deemed it necessary in the interest of national defense that possession be taken of the plants of the companies named in a list attached to his order, including the plants of plaintiffs, and that therefore he did take possession of the same, effective April 8, 1952. By the same order, he designated the president of each company as operating manager for the United States until further notice, and directed him to operate the plants of such company, subject to defendant's supervision. Telegraphic notification to this effect was given to the president of each company.

Plaintiffs thereupon brought these actions praying for declaratory judgments and injunctive relief, and there are now before me for decision motions for temporary injunctions seeking to restrain the defendant from taking any action under the authority of the Executive Order. These motions were combined for hearing and have been fully heard. Voluminous briefs have been filed and considered.

[fol. 236] At the hearing, plaintiff United States Steel limited its motion to a preservation of the status quo in respect of terms and conditions of employment.

Plaintiffs contend that defendant's acts under the Executive Order resulting in the seizure of their plants are without authority of law and constitute an illegal invasion of their property and rights, and that they are entitled to preliminary injunctions to restrain defendant from acting thereunder, particularly in the light of his threat to make changes in terms and conditions of employment. The basis of plaintiffs' contention is that there is no constitutional or statutory right in the President to issue the Executive Order, and there being none; defendant acting thereunder is acting without legal authority and his acts are illegal and contrary to law. Plaintiff Lavino has urged an additional reason, namely, that it has been improperly included among the plants seized.

Defendant contends in his Opposition to the motions that the breakdown of collective bargaining negotiations "created an immediately impending national emergency because interruption of steel manufacture for even a brief period would seriously endanger the well-being and safety of the United States in a critical situation"; that the President has "inherent power in such a situation to take possession of the steel companies in the manner and to the extent which he did by his Executive Order"; that the courts are without power to negate Executive action of the President by enjoining it; that the courts will not interfere in advance of a full hearing on the merits except upon a showing that the damage to flow from a refusal of a temporary injunction is irreparable and outweighs the harm which would result from its issuance; and that, since the right of the companies to recover all damages resulting from the taking has been recognized by Supreme Court decisions, there is no showing that the companies' legal remedy is inadequate or that their injury is irreparable.

Before proceeding to a discussion of the points of law involved herein, it should be said that the merits of the controversy between plaintiffs and the United Steel Workers of America, C. I. O., are not before the Court for adjudication. Further, it should be noted that, although there is no law of the case rule in interlocutory orders in

this jurisdiction, these cases are in a materially different posture than they were when Judge Holtzoff of this court refused a temporary restraining order in respect of several of them.

The fundamental issue is whether the seizure is or is not authorized by law. In my opinion, this issue should be decided first, and that I shall now do.

There is no express grant of power in the Constitution authorizing the President to direct this seizure. There is no grant of power from which it reasonably can be implied. There is no enactment of Congress authorizing it. On what, then, does defendant rely to sustain his acts? According to his brief, reiterated in oral argument, he relies upon the President's "broad residuum of power" sometimes referred to as "inherent" power under the Constitution, which, as I understand his counsel, is not to be confused with "implied" powers as that term is generally understood, namely, those which are reasonably appropriate to the exercise of a granted power.¹

This contention requires a discussion of basic fundamental principles of constitutional government, which I have always understood are immutable, absent a change in the framework of the Constitution itself in the manner provided therein. The Government of the United States was created by the ratification of the Constitution. It derives its authority wholly from the powers granted to it by the Constitution, which is the only source of power authorizing action by any branch of Government. It is a government of limited, enumerated, and delegated powers.² The office of President of the United States is a branch of the Government, [fol. 238] namely, that branch where the executive power is vested, and his powers are limited along with the

¹ *McCullock v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579.

² *McCullock v. Maryland*, *supra*; *Dorr v. United States*, 195 U. S. 134, 140, 49 L. Ed. 128; *Graves v. New York ex rel O'Keefe*, 306 U. S. 466, 83 L. Ed. 927; *Scott v. Sandford*, 60 U. S. 393, 19 How. 401, 15 L. Ed. 691.

powers of the two other great branches or departments of Government, namely, the legislative and judicial.³

The President therefore must derive this broad "residuum of power" or "inherent" power from the Constitution itself, more particularly Article II thereof, which contains the grant of Executive power. That Article provides that the Executive power shall be vested in the President; that he shall swear that he will faithfully execute the office of President and will to the best of his ability preserve, protect, and defend the Constitution of the United States (Sec. 1); that he shall be commander in chief of the army and navy of the United States (Sec. 2); and that he shall take care that the laws be faithfully executed (Sec. 3). These are the only sections which have any possible relevancy, and their mere enumeration shows the utter fallacy of defendant's claim. Neither singly nor in the aggregate do they grant the President, expressly or impliedly, as that term has hereinabove been defined, the "residuum of power" or "inherent" power which authorizes him, as defendant claims, to take such action as he may deem to be necessary, including seizure of plaintiffs' properties, whenever in his opinion an emergency exists requiring him to do so in the public interest.^{3A} Instead, in Congress is lodged,

³ Ex parte Quirin, 317 U. S. 1, 25; Ex parte Milligan, 4 Wall. 2, 136-137, 18 L. Ed. 281; Lichter v. United States, 334 U. S. 742, 779. Amendment IX to the Constitution provides that the enumeration therein, of certain rights, shall not be construed to deny or disparage others retained by the people, and Amendment X provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

^{3A} The Supplemental Memorandum of defendant, received April 29, 1952, after argument, states that he does not go beyond claiming "that the President possesses the constitutional power and duty to take action in a grave national emergency such as existed here." This statement relates his claim to the instant case, but does not change his general basic claim as above set forth, which he necessarily must assert to sustain his defense herein.

within Constitutional limitations, the power "to provide for the common defense and general welfare" (Art. I, Sec. 8).

[fol. 239] The non-existence of this "inherent" power in the President has been recognized by eminent writers, and I cite in this connection the unequivocal language of the late Chief Justice Taft in his treatise entitled "Our Chief Magistrate and His Powers" (1916) wherein he says: "The true view of the Executive function is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an Act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest, and there is nothing in the Neagle case and its definition of a law of the United States, or in other precedents, warranting such an inference. The grants of Executive power are necessarily in general terms in order not to embarrass the Executive within the field of action plainly marked for him, but his jurisdiction must be justified and vindicated by affirmative constitutional or statutory provision, or it does not exist."

I stand on that as a correct statement of the law. Defendant, realizing the untenable position in which that statement places him, attempts to weaken it by referring to statements made by Chief Justice Taft in *Myers v. United States*, 272 U. S. 52, 164 (1923) wherein the Court sustained the President's authority to remove a postmaster appointed with the advice and consent of the Senate, but all that the Court held was that Article II granted the President "the executive power of the Government, i. e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed." I see in that decision nothing inconsistent with his previous pronouncement, in that he traces the authority to a specific power granted to the President; but apparently fearing that someone might [fol. 240] read certain obiter in the *Myers* case as contrary

thereto, as defendant now does, the Supreme Court in *Humphrey's Executor v. United States*, 295 U. S. 602, 626 (1935), in a unanimous opinion written by Mr. Justice Sutherland, removed any doubt with respect thereto, in the following language: "In the course of the opinion of the Court [in the *Myers* case], expressions occur which tend to sustain the Government's contention, but these are beyond the point involved and, therefore, do not come within the rule of *stare decisis*. Insofar as they are out of harmony with the views here set forth, these expressions are disapproved." And the view set forth in that opinion was that the President had no power to remove a member of the Federal Trade Commission by reason of the fact that he was a member of a quasi-legislative and quasi-judicial agency of government and not a purely executive officer as was *Myers*.

This would seem to dispose of defendant's contention that the Supreme Court differed from the hereinabove quoted views of Chief Justice Taft.

But defendant goes further and says there is no lack of judicial recognition of this "flexible executive power" to seize property without authority of a statute, and he cites, in support of this statement, the following cases: *Roxford Knitting Co. v. Moore & Tierney*, C. C. A. N. Y. 265 Fed. 177, 179; but that case involved power exercised under a war statute. *Employers Group of Motor Freight Carriers, Inc., et al. v. National Labor Board et al.*, 79 U. S. App. D. C. 105, 107, 111, 143 F. 2d 145, 147, 151; but that likewise involved a war statute, and no rights had been taken or threatened to be taken which required review of the Board's order. *Alpirn et al. v. Huffman et al.*, D. C. Nebr., 49 F. Supp. 337; but that likewise was under a statute authorizing the President during the national emergency to make requisitions. *United States v. Pewee Coal Co., Inc.*, 341 U. S. 114, where there was a nonstatutory seizure during World War II, and where compensation was allowed; but he neglected to state that the legality of the seizure was not in issue in the case (88 F. Supp. 426). These cases are therefore not apposite.

[fol. 241] He next cites general language from the works of Alexander Hamilton, Vol. 4, page 438, but it is far from convincing when read in context. He thereafter cites *In re Neagle*, 135 U. S. 1, involving a habeas corpus proceeding

brought by Neagle, a United States Marshal who killed David S. Terry in defense of Judge Stephen J. Field, but that case traced the source of power in the Executive to Article II, Sec. 3, requiring that he shall "take care that the laws be faithfully executed." He also cites the Prize Cases, 2 Black 635, 17 L. Ed. 459, but that simply upheld the validity of President Lincoln's blockade of southern ports and was predicated upon the existence of a state of war, which is not claimed by defendant to exist. He also cites *In re Debs*, 158 U. S. 564, concerning the dispatch of troops by President Cleveland in a labor dispute, for the purpose of enforcing the faithful execution of the laws of the United States and the protection of its property and removing obstructions to interstate commerce and the United States mail. There, again, the authority is traced to an express grant of power. These cases therefore do not support his contention, but refute it. He next refers to seizures by former presidents, some during war and several shortly preceding a war, without the authority of statute, but it is difficult to follow his argument that several prior acts apparently unauthorized by law, but never questioned in the courts, by repetition clothe a later unauthorized act with the cloak of legality. Apparently, according to his theory, several repetitive, unchallenged, illegal acts sanctify those committed thereafter. I disagree.

Defendant also contends that the Executive has an inherent power in the nature of eminent domain, which justifies his action. The power of eminent domain is a Congressional power. As stated by the Supreme Court in *Hoe v. United States*, 218 U. S. 323, 336, "The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government." The President therefore does not have the power of eminent domain, and the cases defendant cites do not disclose that he has anything in the nature of such power. [fol. 242] Instead, they relate to the right of the Government to take and destroy property in connection with military operations. They set forth the stringent requirements for the exercise of this right and hold that, in some instances, there is an obligation, "upon the general principle of justice," to pay therefor. *United States v. Pacific R. R.*, 120

U. S. 227. These cases have no application to the issues here involved, and there is no merit to this point.

Defendant also quotes from the autobiography of President Theodore Roosevelt at pages 388-389, wherein he states that it was "not only his right but his duty [as President] to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws"; and that he "acted for the public welfare . . . acted for the common well-being of all our people, whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition." That is defendant's only support for his position and for his "Stewardship" theory of the office of President, but with all due deference and respect for that great President of the United States, I am obliged to say that his statements do not comport with our recognized theory of government, but with a theory with which our government of laws and not of men is constantly at war.

Enough has been said to show the utter and complete lack of authoritative support for defendant's position. That there may be no doubt as to what it is, he states it unequivocally when he says in his brief that he does "not perceive how Article II [of the Constitution] can be read . . . so as to limit the Presidential power to meet all emergencies," and he claims that the finding of the emergency is "not subject to judicial review." To my mind this spells a form of government alien to our constitutional government of limited powers. I therefore find that the acts of defendant are illegal and without authority of law.

I shall next turn to defendant's claim that the courts are without power to negate executive action of the President. Defendant relies on the case of *Mississippi v. Johnson*, 4 [fol. 243] Wall 475, where the Supreme Court held that the Judiciary would not attempt to control the President. But in this case the President has not been sued. Charles Sawyer is the defendant, and the Supreme Court has held on many occasions that officers of the Executive Branch of the Government may be enjoined when their conduct is unauthorized by statute, exceeds the scope of constitutional authority, or is pursuant to unconstitutional enactment. *Larson v. Domestic and Foreign Commerce Corp.*, 337 U. S. 682. *Land v. Dollar*, 330 U. S. 731. Philadelphia

Co. v. Stimson, 223 U. S. 605. Lee v. United States, 106 U. S. 196. There is no doubt, therefore, that the defendant is subject to an injunction, and the President not only is not a party but he is an indispensable party to this action, as held in Williams v. Fanning, 332 U. S. 490. Hynes v. Grimes Packing Co., 337 U. S. 86. I find this point no bar to plaintiff's claim to relief.

Taking up the next point, namely, that the courts will not interfere in advance of a full hearing on the merits⁵ except upon a showing that the damage to flow from a refusal of a temporary injunction is irreparable and that such damage outweighs the harm which would result from its issuance, I first find as a fact, on the showing made and without burdening this opinion with a recital of facts, that the damages are irreparable. As to the necessity for weighing the respective injuries and balancing the equities, I am not sure that this conventional requirement for the issuance of a preliminary injunction is applicable to a case where the Court comes to a fixed conclusion, as I do, that defendant's acts are illegal. On such premise, why are the plaintiffs to be deprived of their property and required to suffer further irreparable damage until answers to the complaints are filed and the cases are at issue and are reached for hearing on the merits? Nothing that could be submitted at such trial on the facts would alter the legal conclusion I have reached. But assuming I am required to balance the equities, what is the situation in which I find this case? I am told by defendant of the disastrous effects [fol. 244] on our defense efforts and economy if an injunction should be granted, because it would automatically be followed by a crippling strike; and I am asked to weigh that damage against the incalculable and irreparable injuries to plaintiffs' multi-billion-dollar industry, if I should refuse to issue it. Assuming the disastrous effects on the defense effort envisioned by the defendant, that can come about only in case of a strike, and that presupposes that the United Steel Workers will strike notwithstanding the damage it will cause our defense effort. It also presupposes that the Labor Management Relations Act, 1947, is inade-

⁵ Expedition of a hearing on the merits has been opposed by defendant.

quate when it has not yet been tried, and is the statute provided by Congress to meet just such an emergency. And it further presupposes, as defendant apparently does, that, this statute being inadequate, Congress will fail in its duties, under the Constitution, to legislate immediately and appropriately to protect the nation from this threatened disaster. I am unwilling to indulge in that assumption, because I believe that our procedures under the Constitution can stand the stress and strains of an emergency today as they have in the past, and are adequate to meet the test of emergency and crisis.

Under these circumstances I am of the opinion that, weighing the injuries and taking these last-mentioned considerations into account, the balance is on the side of plaintiffs. Furthermore, if I consider the public interest from another viewpoint, I believe that the contemplated strike, if it came, with all its awful results, would be less injurious to the public than the injury which would flow from a timorous judicial recognition that there is some basis for this claim to unlimited and unrestrained Executive power, which would be implicit in a failure to grant the injunction. Such recognition would undermine public confidence in the very edifice of government as it is known under the Constitution.

The remaining claim of the defendant is that plaintiffs have a plain, adequate, and complete remedy by a suit in the Court of Claims for damages, and therefore equity can not take cognizance of the case. The records show that monetary recovery would be inadequate; but aside from [fol. 245] that, the seizure being unauthorized by law, there could be no recovery under an implied contract,⁶ and there can be none under the Federal Tort Claims Act.⁷ This Act expressly provides that any claim based upon an act of an employee of the Government in the execution of a

⁶ *Hooe v. United States*, supra; *United States v. North American Transportation & Trading Co.*, 253 U. S. 330, 64 L. Ed. 935.

⁷ 28 U. S. C. A. 1346b.

regulation, whether or not it be valid, is excepted from its terms.⁸

For the foregoing reasons I am of the opinion that preliminary injunctions restraining defendant from acting under the purported authority of Executive Order 10340 should be issued in favor of all plaintiffs except the United States Steel Company. That company verbally limited its motion to one for a preliminary injunction to restrain defendant from making any changes in the terms and conditions of employment. That I am unwilling to issue because of its stultifying implications. I could not consistently issue such an injunction which would contemplate a possible basis for the validity of defendant's acts, in view of my opinion hereinabove expressed, and moreover, a preliminary injunction should maintain the status quo as of the date of the wrongful acts complained of. If the United States Steel Company wishes to withdraw its verbal amendment and proceed on the basis of its original motion, leave will be granted for that purpose, and the same injunction issued to it as to the other plaintiffs.

Counsel will submit, with all due speed, orders in accordance herewith.

David A. Pine, Judge.

[fol. 246] IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

THE YOUNGSTOWN SHEET AND TUBE COMPANY, a Body
Corporate, et al., Plaintiffs,

v.

CHARLES SAWYER, Secretary of Commerce, U. S., Defendant

PRELIMINARY INJUNCTION—Filed April 30, 1952

This cause came on to be heard at this term upon motion of the plaintiffs for a preliminary injunction, and upon consideration thereof, the affidavits and briefs filed by the re-

⁸ See *Old King Coal Co. v. United States*, S. D. Iowa, 88 F. Supp. 124; *Jones v. United States*, S. D. Iowa, 89 F. Supp. 980.

spective parties, and the arguments of counsel, and the Court having determined by its opinion filed herein on April 29, 1952, in which the Court's findings of fact and conclusions of law appear, that the seizure and taking possession on or about April 8, 1952 of the plaintiffs' plants, facilities and properties by the defendant was, and his continued possession thereof is, illegal and without authority of law, and that irreparable damage will result to the plaintiffs unless the defendant is enjoined and restrained as hereinafter provided, it is by the Court this 30th day of April, 1952,

Adjudged and ordered, that, pending the final hearing and determination of this cause, the defendant, his officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, be, and hereby are, enjoined and restrained from continuing the seizure and possession of the plants, facilities and properties of the plaintiffs and from acting under the purported authority of Executive Order No. 10340;

[fol. 247] Provided, however, that the plaintiffs shall give security, in the sum of One hundred Dollars (\$100). (or make deposit of cash with the Clerk of this Court in said sum in lieu thereof) for the payment of such costs and damages as may be incurred or suffered by the defendant if he should be found to have been wrongfully enjoined or restrained.

David A. Pine, Judge.

[File endorsement omitted.]

[fol. 248] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed April 30, 1952

Notice is hereby given that the defendant appeals to the United States Court of Appeals for the District of Columbia from the order of the United States District Court for the District of Columbia dated April —, 1952, granting a pre-

liminary injunction, and from each and every part of said order.

Respectfully submitted, Holmes Baldridge, Assistant
Attorney General.

Of Counsel: James R. Browning, Edward H. Hickey, Marvin C. Taylor, Samuel D. Slade, Benjamin Forman, Herman Marcuse, T. S. L. Perlman, Attorneys, Department of Justice.

[File endorsement omitted.]

[fol. 249] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

APPLICATION FOR STAY OF THE ORDER GRANTING PRELIMINARY
INJUNCTION—Filed April 30, 1952

Now comes the defendant in the above-entitled case, pursuant to the provisions of Rule 62 (c) of the Federal Rules of Civil Procedure, having appealed from this Court's order herein dated April —, 1952 granting a preliminary injunction against the defendant and others as therein specifically stated, and prays that said order be stayed pending disposition of defendant's appeal therefrom, and in support thereof respectfully shows the Court:

That as found by the President in Executive Order No. 10340, and as established by the uncontested affidavits of Robert A. Lovett, Secretary of Defense, Gordon Dean, Chairman of the United States Atomic Energy Commission, Manly Fleischmann, Administrator of the Defense Production Administration, Henry H. Fowler, Administrator of the National Production Authority, Oscar L. Chapman, Secretary of the Interior, Jess Larson, Administrator of General Services, Homer C. King, Acting Administrator of the Defense Transportation Administration, Charles Sawyer, Secretary of Commerce, Harry Weiss, Executive Director of the Wage Stabilization Board, and Nathan P. Feinsinger, Chairman of the Wage Stabilization Board, [fol. 250] filed herein, a work stoppage in the steel industry

would immediately jeopardize and imperil our national defense and the defense of those joined with this Nation in resisting aggression; and

That, as the head of the United Steel Workers of America, CIO, has publicly announced, such a work stoppage will immediately result if the order appealed from is not stayed and the possession of the steel plants by the United States is terminated.

Respectfully submitted, Holmes Baldrige, Assistant Attorney General.

Of Counsel: James R. Browning, Edward H. Hickey, Marvin C. Taylor, Samuel D. Slade, Benjamin Forman, Herman Marcuse, T. S. L. Perlman, Attorneys, Department of Justice.

[File endorsement omitted.]

[fol. 251] [Appellant's Designation of Content of Record on Appeal—Omitted in Printing]

[fol. 252] [Order for Clerk to Transmit Original Record to Court of Appeals—Omitted in Printing]

[fol. 257] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

[fol. 259] ORDER UPON DEFENDANT'S APPLICATION FOR A STAY—Filed April 30, 1952

This cause came on to be heard upon the defendant's motion for a stay pending appeal of the Court's order of April 30th, 1952, granting a temporary injunction as therein stated, and was argued by counsel. Upon consideration thereof, it is hereby

Ordered, adjudged and decreed that the said motion be and the same hereby is denied.

David A. Pine, Judge of U. S. District Court for the District of Columbia.

[File endorsement omitted.]

[fol. 94] IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Civil Action No. 1625-'52

No. 11404-13

UNITED STATES STEEL COMPANY, 525 William Penn Place,
Pittsburgh, Pennsylvania, Plaintiff,

v.

CHARLES SAWYER, Department of Commerce, Washington,
D. C., Defendant

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE
RELIEF—Filed April 11, 1952

Plaintiff, United States Steel Company, alleges:

1. This is an action for a declaratory judgment brought pursuant to the provisions of the Act of June 25, 1948, c. 646, 62 Stat. 964, as amended by the Act of May 24, 1949, c. 139, sec. 111, 63 Stat. 105 (28 U. S. C. A. §§ 2201 and 2202) and for an injunction.

2. Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of New Jersey and is a citizen and a resident of said State. It is engaged in integrated operations for the production and sale of a wide variety of steel products, and operates, among other things, steel producing, manufacturing and fabricating plants in various states of the United States. In the operation of said plants and related facilities plaintiff owns and uses extensive real and personal properties, funds, rights, franchises and other valuable assets. It employs over 260,000 persons in its enterprise and has an investment totaling many millions of dollars in plant and related facilities.

[fol. 95] Many of plaintiff's customers have pending orders for steel and steel products for use in applications having no relation to the defense effort of the United States.

3. Defendant, Charles Sawyer, is Secretary of Commerce of the United States and is a resident of the District of Columbia.

4. This action involves questions under the Constitution and laws of the United States. The matter in controversy

exceeds, exclusive of interest and costs, the sum of \$3,000. There exists between the parties herein an actual justiciable controversy in respect of which plaintiff requires a declaration of its rights by this Court.

5. On April 9, 1952, plaintiff received from defendant a telegram and on April 10, 1952 an order designated Order No. 1 and dated April 8, 1952, which telegram and order purport to take possession of all properties of plaintiff, except railroads and all coal and metal mines. The telegram and order, which are annexed hereto as Exhibits A and B, respectively, purport to have been issued pursuant to authority vested in defendant by Executive Order No. 10340 issued by the President of the United States on April 8, 1952. Such Executive Order is annexed hereto as Exhibit C.

6. Prior to April 9, 1952, plaintiff had enjoyed peaceful possession and the exclusive operation of the properties referred to in paragraph 2 hereof, and had operated the same in all respects consistent with applicable laws of the United States and of the various States of the United States having jurisdiction thereof.

[fol. 96] 7. The United Steelworkers of America (hereinafter called the "Union") represents certain employees of plaintiff at the plants and facilities referred to in paragraph 2 hereof for the purposes of collective bargaining. Since November 27, 1951, plaintiff has been engaged in collective bargaining negotiations with the Union concerning wages and other conditions of employment. On December 22, 1951, the President referred the matter to the Wage Stabilization Board for consideration and recommendation. Plaintiff did not agree to be bound by or to accept any recommendations by the Wage Stabilization Board. On December 31, 1951, the labor agreements which had theretofore been in effect between plaintiff and the Union expired. On March 20, 1952, the Wage Stabilization Board made certain recommendations with respect to the employment conditions under negotiation. Plaintiff has not accepted the recommendations of the Wage Stabilization Board. A strike of the employees of plaintiff and of most other producers of steel products was called by the Union for 12:01 a. m., April 9, 1952.

8. On April 8, 1952, the President issued the aforesaid

Executive Order No. 10340, purporting to authorize and direct defendant to take possession of all or such of the plants, facilities and other property, or any part thereof, of listed companies, including plaintiff, as he may deem necessary in the interest of national defense; and to operate or to arrange for the operation thereof and to do all things necessary for, or incidental to, such operation. The Executive Order recites the fact that a strike had been called, and states that the Executive Order is issued to assure the [fol. 97] continued availability of steel and steel products. The Executive Order directs defendant, among other things, to determine and prescribe terms and conditions of employment under which the plants, facilities, and other properties, possession of which is taken pursuant to that Order, shall be operated.

9. Defendant's Order No. 1 provides, among other things, that plaintiff's plants, facilities and other properties are to be operated in accordance with such regulations and orders as are promulgated by defendant and recites that the management, officers and employees of plaintiff's plants are serving the Government of the United States.

10. Sections 206-210 of the Labor Management Relations Act of 1947 (61 Stat. 136; 29 U. S. C. A. App. § 141) provide specific machinery for dealing with threatened or actual strikes which affect an entire industry or a substantial part thereof and which in the opinion of the President imperil the national health or safety. Congress in the course of its consideration of this Act considered and specifically rejected the device of seizure as a means of dealing with such a strike. In the Act Congress has authorized the President to establish a Board of Inquiry and to petition a district court of the United States to enjoin a threatened or actual strike for a period not exceeding 60 days, during which period it shall be the duty of the parties to the labor dispute to make every effort to adjust and settle their differences. In the event the dispute is not resolved during such period, and after a secret ballot of the employees of each employer involved in the dispute, the Act requires the President to submit to the Congress a full and [fol. 98] comprehensive report of the proceedings together with such recommendations as he may see fit to make for consideration and appropriate action by the Congress. The

President has not invoked the provisions of this Act in connection with the labor dispute between plaintiff and the Union.

11. Section 18 of the Universal Military Training and Service Act (62 Stat. 635; 50 U. S. C. A. App. § 468) provides that, upon the President's determination that it is in the interest of the national security to obtain prompt delivery of any articles or materials, the procurement of which has been authorized by the Congress exclusively for the use of the Armed Forces of the United States or the use of the Atomic Energy Commission, the United States is authorized to place orders for such articles or materials. Any person with whom such an order is placed is to be advised that such order is placed pursuant to the provisions of this section. In case the person with whom such an order is placed refuses or fails to fill such order, the President is authorized to take immediate possession of the plant of such person and to operate it for the production of such articles or materials as may be required by the United States. Plaintiff has received no orders placed pursuant to the provisions of this Act.

12. Section 201 of the Defense Production Act of 1950, as amended (64 Stat. 799, 65 Stat. 132; 50 U. S. C. A. App. § 2081) authorizes the President, whenever he deems it necessary in the interest of national defense, to acquire any real property including facilities, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, upon the payment of just compensation in accordance with procedures set forth in the Act. The President has made no determination pursuant to this Act with respect to any property of plaintiff nor has he taken any action to acquire any such property in accordance therewith.

13. Executive Order No. 10340 and the actions of defendant taken or to be taken in pursuance thereof are unlawful and without effect in that

(a) They are without authority under any statute of the United States, and specifically are outside of and inconsistent with the authority and procedures provided under the Labor Management Relations Act of 1947, the Universal Military Training and Service Act,

and the Defense Production Act of 1950, as amended.

(b) They are without authority under any provision of the Constitution of the United States, and specifically are beyond the powers conferred upon the President by Article II of the Constitution. They constitute a usurpation by the President of the powers placed by the Constitution in the Congress of the United States.

(c) They are unconstitutional in that they deprive the plaintiff of liberty and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

(d) They are unconstitutional in that they unlaw- [fol. 100] fully take from the plaintiff private property without just compensation in violation of the Fifth Amendment to the Constitution of the United States.

(e) They are unconstitutional in that they constitute an unreasonable seizure of the property, papers, and effects of plaintiff and a denial and disparagement of the rights of plaintiff in violation of the Fourth and Ninth Amendments to the Constitution of the United States.

14. Defendant's seizure of plaintiff's properties has been effected without the consent of plaintiff and over its protest. Plaintiff is without any means save by this suit, to protect and to assert its rights in its properties.

15. The actions of defendant taken or to be taken pursuant to Executive Order No. 10340 substantially and irreparably injure plaintiff and will continue to do so, in the respects, among others, hereinafter set forth. For such injury plaintiff has no prompt, adequate, and effective remedy at law.

(a) Seizure by defendant deprives plaintiff of its right to bargain collectively with its employees. Under defendant's Order No. 1 plaintiff's management is directed to act, in its relations with its employees, in accordance with the instructions of defendant. This unlawful interference with, and denial of, plaintiff's right freely to bargain collectively, imposed at a critical stage of plaintiff's negotiations with the Union, will irreparably alter, to plaintiff's injury, the status of the

bargaining between plaintiff and the Union, particularly in connection with the current labor dispute.

[fol. 101] (b) In view of the provision of Executive Order No. 10340 that defendant shall determine and prescribe terms and conditions of employment in plaintiff's plants, the necessary effect of the seizure if permitted to continue is to enable defendant to concede to the Union and place in effect the recommendations of the Wage Stabilization Board, including an increased wage scale, the union shop, and other concessions to the Union. Plaintiff is subject to coercion by defendant as to the future conditions of employment of its employees.

(c) The placing into effect of and the coerced compliance by plaintiff with the recommendations of the Wage Stabilization board would result in greatly increased cost of production of plaintiff's products. These products are subject to price regulations imposed by the United States and the governmental agency regulating such prices has failed and refuses to permit increases in the prices of such products so as to enable plaintiff to attempt to recoup such increased costs.

(d) The seizure enables defendant to alter, disrupt, and otherwise interfere with normal customer relationships between plaintiff and its customers, and gives to defendant and his agents unlimited access at any time to confidential information and trade secrets of immeasurable value to plaintiff in its business.

(e) Under the terms of defendant's Order No. 1, transferring plaintiff's plant, facilities, and business [fol. 102] from plaintiff to defendant for an indefinite period of time plaintiff is deprived of its right freely to operate its property, to program its future business, to expand its facilities, and to protect its investment. Even though the present management personnel of plaintiff remain in their respective positions and even though defendant does not immediately issue any order designed to alter plaintiff's normal course of business, plaintiff's management and directors cannot fully and freely exercise managerial judgment since they cannot know how long defendant's control will continue, when

or in what respects defendant will veto or otherwise affect a given management decision, what are and will be their legal rights and obligations under contracts entered into prior to defendant's seizure, or what will be the legal consequences of any contracts entered into during the period of defendant's seizure of plaintiff's properties. They know only that they are now directed to serve defendant, purportedly in the name of the United States.

(f) The goodwill of the nationwide business of plaintiff in a going concern which has been built up during the first half of this century with tremendous and continuous effort and at enormous expense is threatened with adverse and permanent impairment by defendant's seizure of its properties.

(g) Plaintiff's loss of freedom of collective bargaining, of maintenance of normal relationships in its business, of the benefit of private management and initiative in the control of a vast and complicated property, the injury to its goodwill and other elements of damage specified herein cannot possibly be adequately measured in monetary terms or be remedied in an action at law. Plaintiff necessarily faces the prospect of being forced to resort to successive, numerous and burdensome actions at law to recover for such measurable damage to it as may occur from time to time during the indefinite period of, and because of, defendant's seizure of plaintiff's properties. It is plaintiff's information and belief that defendant would not be financially able to pay judgments, which might run into many millions of dollars, growing out of action taken with respect to the vast and complicated properties of plaintiff. Plaintiff has no assurance that it will recover full and adequate compensation, if any, from the United States for damage to its properties and business arising from defendant's unlawful action herein set forth.

Therefore the injunctive and declaratory relief prayed herein is the only means available to plaintiff for the protection of its rights.

Wherefore, it is prayed that:

A. Defendant be declared to have no right to seize plaintiff's properties under the purported authority of Executive Order No. 10340, or to require compliance by plaintiff with defendant's Order No. 1 or other orders of a supplementary or similar nature.

[fol. 104] B. Defendant and all persons acting as his agents or under his direction or authority be temporarily enjoined, pending a final determination of this cause, from taking any action under the purported authority of Executive Order No. 10340 which in any way would affect, impair, or restrict plaintiff's possession, control and management of any of its properties.

C. Upon a final hearing, the aforesaid temporary injunction be made permanent.

D. Plaintiff be granted such other or further relief as may seem appropriate in the premises.

John W. Davis, Theodore Kiendl, Davis, Polk, Wardwell, Sunderland & Kiendl, 15 Broad Street, New York 5, N. Y. John Lord O'Brian, Howard C. Westwood, Covington & Burling, 701 Union Trust Building, Washington 5, D. C. Roger M. Blough, 525 William Penn Place, Pittsburgh, Pennsylvania, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 105] [Duly sworn to by John A. Stephens, jurat omitted in printing.]

[fol. 106]

EXHIBIT A

Telegram

[Omitted. Printed side page 38 ante.]

[fol. 108]

EXHIBIT B

Order No. 1

[Omitted. Printed side page 40 ante.]

[fol. 115]

EXHIBIT C

Executive Order No. 10340

[Omitted. Printed side page 8 ante.]

[fol. 122] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR PRELIMINARY INJUNCTION—Filed April 19, 1952

The plaintiff, United States Steel Company, moves the Court for an order granting a preliminary injunction against the defendant, Charles Sawyer, and all persons acting as his agents or under his direction or authority, pending this suit, and until further order of the Court, upon the grounds and in accordance with the prayers as set forth in the complaint filed in this action on April 11, 1952.

Howard C. Westwood, Attorney for Plaintiff, Covington & Burling, 701 Union Trust Building, Washington 5, D. C.

[File endorsement omitted.]

[fol. 123] Service of the foregoing motion, and annexed points and authorities, by copies thereof, is hereby acknowledged and accepted this 18th day of April, 1952.

Charles Sawyer, Department of Commerce, Washington, D. C., Philip B. Perlman, Acting Attorney General of the United States, Department of Justice, Washington, D. C., Charles M. Ireland, United States Attorney, District of Columbia, United States Court House, Washington, D. C.

[Certificate of service omitted in printing.]

[fol. 124] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION—Filed April 19, 1952

Point 1

The defendant's action in seizing the properties of the plaintiff is completely unauthorized and unlawful under the Constitution and statutes of the United States. *Ex parte Milligan*, 4 Wall. 2, 136-37 (1886); *Hooe v. United States*, 218 U. S. 322 (1910).

Point 2

The plaintiff is entitled to injunctive protection against the irreparable injury which will otherwise result from the defendant's actions. *Federal Rules of Civil Procedure*, Rule [fol. 125] 65 (b); *Hynes v. Grimes Packing Co.*, 337 U. S. 682 (1949); *Kendall v. United States ex rel Stokes*, 12 Pet. 524 (U. S. 1838); *Publicker Industries, Inc. v. Andersen*, 68 F. Supp. 532 (D. D. C. 1946); *Hart Coal Corp. v. Sparks*, 9 F. Supp. 825 (W. D. Ky. 1935).

Point 3

An unlawful taking under claim of exercise of eminent domain will be enjoined to avoid irreparable injury. See *Osborne v. Missouri Pacific Railway*, 147 U. S. 248, 258-59 (1892); *Porto Rico Tel. Co. v. Puerto Rico Comm. Authority*, 189 F. 2d 39 (1st Cir. 1951); cf. *Hurley v. Kincaid*, 285 U. S. 95, 104 (1932).

Point 4

The defendant may be enjoined from exceeding his legal authority. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U. S. 682 (1949).

Respectfully submitted.

Howard C. Westwood, Attorney for Plaintiff, 701
Union Trust Building, Washington 5, D. C.

April 18, 1952.

[File endorsement omitted.]

[fol. 126] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT NO. 1 TO COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF—Filed April 24, 1952

Plaintiff, United States Steel Company, hereby amends its complaint as follows:

1. *Paragraph 10.* Change "60 days" in line 14 to read "80 days."

2. *Paragraph 13.*

a. Add new subparagraph (e) as follows:

"(e) They are unconstitutional in that they take from the plaintiff private property for a use other than a public use in violation of the Fifth Amendment to the Constitution of the United States."

b. Redesignate the present subparagraph "(e)" as "(f)."

c. Add new subparagraphs (g)-(i) as follows:

"(g) They are unconstitutional in that they violate and invade the rights reserved to the people under the Tenth Amendment to the Constitution of the United States."

[fol. 127] "(h) They are unconstitutional in that they invade the powers vested exclusively in the Congress under Section 1 and under Section 8, Article I, and Section 3, Article IV, of the Constitution of the United States."

"(i) They violate the plaintiff's right under the National Labor Relations Act, as amended, to bargain collectively with its employees concerning terms and conditions of employment."

Howard C. Westwood, Covington & Burling, 701 Union Trust Building, Washington 5, D. C., Attorney for Plaintiff.

[File endorsement omitted.]

Duly sworn to by John A. Stephens. Jurat omitted in printing.

[fol. 128] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT—Filed April 24, 1952

DISTRICT OF COLUMBIA, SS:

Wilbur L. Lohrentz, being duly sworn, deposes and says:

1. I am Assistant to the Vice President of Industrial Relations of the United States Steel Company.

2. In the course of my duties, I have followed step by step and have participated in many of the bargaining conferences between the United States Steel Company and the United Steelworkers of America which commenced in November 1951 and have not yet been concluded. The Company's official records of these negotiations have been maintained under my supervision and direction.

3. The attached Exhibit A contains a chronology of these negotiations which I have prepared from the records above referred to. The statements contained in Exhibit A are [fol. 129] true and correct to the best of my knowledge and belief.

4. The attached Exhibit B is a true and correct copy of a letter dated November 1, 1951, received by the plaintiff from Philip Murray, President of the United Steelworkers of America

Wilbur L. Lohrentz.

Sworn to and subscribed before me this 23d day of April, 1952. Margaret MacPherson, Notary Public. My Commission expires March 14, 1957.
(Seal)

[File endorsement omitted.]

[fol. 130] EXHIBIT A TO AFFIDAVIT OF WILBUR L. LOHRENTZ

Chronology of Labor Dispute Between the United States Steel Company and the United Steelworkers of America and of the Government's Intervention Therein

November 1, 1951: Pursuant to the provisions of the Labor-Management Relations Act, 1947, the president of the Union sent to plaintiff letter of notification of termination on December 31, 1951, according to its terms¹ of the existing collective bargaining agreement between the United States Steel Company and the Union, and requested the Company to meet with it for the purpose of negotiating terms and conditions of a new collective bargaining agreement.

November 27, 1951: First bargaining conference between the Company and the Union. At this meeting the Union presented 22 demands in broad and general terms.

November 28-30, 1951, December 4-6, 1951: Bargaining conferences were held on each day.

December 10, 1951: The Union presented its demands in contract form in the course of a bargaining conference. These demands were later described by the Union's general counsel as encompassing "literally 100-contract proposals."²

[fol. 131] December 11-14, 1951: Bargaining conferences were held on each day. The parties made little progress toward a settlement of the dispute.

December 18, 1951: In the course of a bargaining conference, the Union notified the Company of its intention to strike on December 31, 1951 at midnight.

¹ The agreement between the Company and the Union provided that the parties should meet "no less than 30 days and no more than 60 days prior to January 1, 1952" for the purposes of negotiating the terms and conditions of a new agreement.

² Transcript of Proceedings Before Panel of Wage Stabilization Board, p. 82.

December 20, 1951: Representatives of the Company and the Union met in joint conference in Washington with officers of the Federal Mediation and Conciliation Service.

December 21, 1951: Representatives of the Company met with officers of the Federal Mediation and Conciliation Service.

December 22, 1951: The President of the United States referred the dispute to the Wage Stabilization Board and asked that the Board investigate and inquire into the issues in dispute and report to him its recommendations as to fair and equitable terms of settlement. At the same time the President called upon the Company and the Union to maintain normal work and production schedules while the matter was before the Board. On receipt of the President's letter, the Chairman of the Board by letter requested the parties to cooperate fully in the Board's proceedings. The Company agreed to do so.

[fol. 132] December 27, 1951: The Union deferred the strike to January 3, 1952.

January 3, 1952: The Board appointed a tripartite panel consisting of two representatives each of industry, labor, and the public to hear evidence and arguments in the dispute and to make such report thereon as the Board might direct. The Union deferred the strike to February 24, 1952.

January 7, 1952: The Wage Stabilization Board met with the parties in a procedural meeting.

January 10-12, 1952, February 1-16, 1952: The tripartite steel panel held public hearings at which the parties were afforded an opportunity to present evidence and arguments on the issues in dispute.

February 21, 1952: The Union deferred the strike to March 23, 1952.

March 13, 1952: The tripartite panel submitted a report, dated March 13, 1952, outlining the issues in dispute and summarizing the position of the parties. In accordance with instructions of the Board, the panel did not deal with the Union's request for a union shop and a guaranteed annual wage.

[fol. 133] March 15, 1952: The Chairman of the Wage Stabilization Board requested the parties to continue production to permit consideration of the report of the panel by the Board, on the understanding that if by April 4 a mutually satisfactory agreement had not been reached, the Union would give 96 hours' prior written notice of any intention to strike.

March 20, 1952: The Wage Stabilization Board issued its report and recommendations for the settlement of the dispute. The Board recommended a general wage increase of $12\frac{1}{2}\text{¢}$ per hour effective January 1, 1952, a further increase of $2\frac{1}{2}\text{¢}$ per hour effective July 1, 1952, and an additional increase of $2\frac{1}{2}\text{¢}$ per hour effective January 1, 1953. The Board also recommended a reduction in geographical differentials, an increase in shift differentials, provision for six holidays with pay, increased vacation benefits and premium pay for Sunday work. The Board further recommended that the parties include a union shop provision in the new contract.

[fol. 134] March 21, 1952: ~~The Union indicated that it would~~ accept the recommendations of the Wage Stabilization Board.

March 26, 1952: The Company and the Union held a bargaining conference.

April 3, 1952: The Company, together with five other steel companies (hereinafter referred to as the "six companies"), held a joint bargaining conference with the Union. The Union issued a strike call for 12:01 a. m., April 9, 1952.

April 4-5, 1952: The six companies met with the Chairman of the Wage Stabilization Board, who came to New York to assist the parties in the settlement of the dispute.

April 6, 1952: The six companies and the Union met jointly with the Chairman of the Wage Stabilization Board in a bargaining conference in New York.

April 7-8, 1952: Representatives of the six companies met with the Chairman of the Wage Stabilization Board in New York.

April 8, 1952: The President seized plaintiff's properties, and directed Charles Sawyer, Secretary of Commerce, to take possession of them and among other things to deter-

mine and prescribe terms and conditions of employment under which the plant, facilities and other seized properties shall be operated.

[fol. 135] April 9-14, 1952: The six companies met in Washington with various Government officials, including the Chairman of the Wage Stabilization Board and Mr. John R. Steelman, Acting Director of Defense Mobilization, under the auspices of Mr. Steelman. Several of such meetings were held jointly with the Union.

April 15, 1952: Mr. Steelman terminated the negotiations as conducted under his auspices.

[fol. 136]

EXHIBIT B

UNITED STEELWORKERS OF AMERICA 5081 (5085)

November 1, 1951.

Registered mail.

Re Production and Maintenance Employees.

Mr. B. F. Fairless, President, United States Steel Company, Formerly Carnegie-Illinois Steel Corporation, 525 William Penn Place, Pittsburgh 30, Pennsylvania.

DEAR SIR:

Pursuant to the provisions of the Labor Management Relations Act of 1947, you are hereby notified that the collective bargaining agreement dated April 22, 1947, as amended July 16, 1948, November 11, 1949, and November 30, 1950, now in effect between the companies and the union, shall terminate in accordance with its provisions as of midnight December 31, 1951, except those portions of the agreement dated November 11, 1949, which, under the terms of that agreement, are not terminable as of December 31, 1951, but remain in full force and effect.

The union hereby requests the company to meet with it at such early time and suitable place as may be mutually convenient for the purpose of negotiating the terms and conditions of a new collective bargaining agreement.

We await your suggestion as to time and place of meeting.

Very truly yours, United Steelworkers of America,
(S.) Philip Murray, President.

[fol. 137] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT—Filed April 24, 1952

DISTRICT OF COLUMBIA, SS:

Lewis M. Parsons, being duly sworn, deposes and says:

1. I am a Vice President of United States Steel Company.
2. I have been associated with companies engaged in the manufacture and sale of steel products since 1919 and have been an officer of the plaintiff or predecessor companies since 1945.

3. The properties of the plaintiff seized by the defendant under purported authority of Executive Order No. 10340 are located in Pennsylvania, Indiana, Illinois, Alabama, Utah and California.

The principal products of plaintiff's basic steel producing divisions are by-product coke, iron, steel ingots, semi-finished steel products, plates, structural shapes and piling, rails and accessories, wheels, axles, bars, concrete reinforcing bars, hot and cold rolled sheets and strip.

4. Other properties of plaintiff seized pursuant to purported authority of Executive Order No. 10340 are engaged in manufacturing and fabricating steel items from basic steel. Such products include large diameter pipe, fabricated structural work, fabricated plate work, oil field machinery and equipment, drums, pails, steel strapping machines, and miscellaneous steel products.

5. The necessity for absolute freedom of discretion on my part and on the part of my colleagues, if the properties of the plaintiff are to be managed with the greatest possible effectiveness, is apparent to me from my experience with the plaintiff and other steel companies. The plain-

tiff's operating manager is now subject to orders from the defendant, a person without previous experience in the management of the steel industry. Under the purported authority of Executive Order No. 10340, the defendant can establish an elaborate organization within the Department of Commerce to assist him in the operation of the steel industry. As an officer of the plaintiff, I must consider that all decisions reached by management may be subject to review, and revision by the defendant, with the [fol.139] result that I and other officers of plaintiff can no longer formulate plans and reach business decisions on our own responsibility. The importance of this impairment of freedom of management is far greater than the importance of any particular matter which may be considered by us. The losses to the plaintiff from an affirmative interference by the defendant in its operation and control as by the imposition of changes in terms and conditions of employment, or any other act which interferes with the over-all balance maintained by its management, would be incalculable.

6. Each of the basic steel producing divisions of the plaintiff reduces iron ore to pig iron in blast furnaces, which in turn is converted into steel in open-hearth, Bessemer or electric furnaces. The steel so produced is in turn formed into blooms and billets and other steel products by rolling, drawing, and forging. Interruptions and modifications which may be necessary to accommodate the plaintiff's operations to the requirements of the defendant would impose large and continuing costs on the plaintiff through impairment of operating efficiency, which extra costs might well continue long after the termination of the defendant's possession and control.

7. During the six years 1946-1951, the plaintiff, in the course of a major program of property improvement, re-[fol.140] placement and modernization, made capital expenditures of many millions of dollars. The program of property improvement is still in progress. The most important new construction is that of the Fairless Works Plant at Morrisville, Pennsylvania. The attainment of this and other new building objectives will depend upon the orderly maintenance of operations throughout the company. Any marked deterioration in the profitability of the plain-

tiff's operations will require plaintiff to reappraise its plans for capital expenditures and to make adjustments as required. The damage to the plaintiff from revisions in its program of capital expenditure resulting from cost increases imposed on the plaintiff by the defendant would be immeasurable.

8. The Fairless Works, mentioned above, when completed will be a large integrated steel plant, capable of the production of many varieties of steel products. It was approximately 35% physically completed as of January 1, 1952, and unless its construction is interfered with, is expected to be substantially completed by the end of 1952. The adverse effect of defendant's seizure of the plaintiff's properties on progress toward completion of this plant may be irreparable.

9. The plaintiff sells steel products to many different types of customers located throughout the United States. Such customers include steel converters and processors, automobile manufacturers and parts producers, makers of tin cans and other containers, railroads, and car build-
[fol. 141] ers, manufacturers of machinery and industrial equipment (including electrical machinery), manufacturers of agricultural implements, manufacturers of electrical appliances and other domestic and commercial equipment, companies engaged in drilling oil and gas wells or producing or transporting from such wells, manufacturers of many types of military equipment, shipbuilders, steel fabricators, contractors and builders, public utilities, and jobbers, dealers and distributors. Whereas a relatively small proportion of the total production of the plaintiff enters into the production of war materials on orders from the Department of Defense or the Atomic Energy Commission, by far the greater proportion of its production is currently being sold for uses unrelated to the defense effort of the United States.

10. The cost to plaintiff of any disruption to its operations as a fully functioning organization for the production of steel products is difficult to appraise. Thus, action to increase wages of plaintiff's production and maintenance employees would require modification of wage and salary rates throughout plaintiff's organization and may well require revision of investment and plant replacement and im-

provement plans to reflect changes in profit estimates resulting therefrom. Defendant's purported authority as derived from Executive Order No. 10340 would permit substantial interference with the proper and experienced management of the plaintiff's property. The pecuniary loss to plaintiff which would result from any such interference is immeasurable.

[fol. 142] 11. Control of plaintiff's properties by the defendant is oppressive and burdensome. The nature of the orders which the defendant may issue cannot be anticipated. Any such orders, be they to make reports, to increase wage rates, to grant longer vacations, to institute premium pay for Sunday work, to require all employees to join the Union, or to do whatever else may in the opinion of the defendant appear to him proper, would impose on the plaintiff costs and obligations and would disturb the effectiveness of the plaintiff's operations as a fully functioning organization to its irreparable damage.

Lewis M. Parsons.

Sworn to and subscribed before me this 23d day of April, 1952. Margaret MacPherson, Notary Public. My Commission expires March 14, 1957.
(Seal.)

[File endorsement omitted.]

[fol. 143] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT—Filed April 24, 1952

DISTRICT OF COLUMBIA, ss:

John A. Stephens, being duly sworn, deposes and says:

1. I am Vice President of Industrial Relations of plaintiff.
2. As of 12:00 midnight, April 8, 1952, defendant seized plaintiff's properties under alleged authority contained in Executive Order No. 10340 issued by the President of the

United States on April 8, 1952, and directed plaintiff's President to act as Operating Manager of plaintiff's properties on behalf of the United States.

3. Plaintiff's President replied to defendant as follows:

[fol. 144] "Honorable Charles Sawyer, Department of Commerce, Washington, D. C.

I acknowledge receipt of your telegram of April 9, 1952, advising that you have appointed me as operating manager on behalf of the United States of the properties of the United States Steel Company referred to in your telegram. Although under protest I shall act in that capacity I must advise you that the United States Steel Company has been advised by counsel and believes that neither you nor the President of the United States has any authority under the Constitution or the laws to take possession of any of its properties. And on behalf of that company and myself I hereby protest against the seizure as unconstitutional and unlawful and inform you that neither the company nor myself is acquiescing in this seizure in any respect, whatever and we intend promptly to vindicate our rights in court.

Benjamin F. Fairless."

4. Coincident with directing plaintiff's president to act as Operating Manager, Defendant, on April 8, 1952, promulgated Order No. 1 in which he formally seized the properties of plaintiff and directed plaintiff's president to operate the plants, facilities and other properties "in accordance with such regulations and orders as are promulgated by me or pursuant to authority delegated by me." On April 11, 1952, defendant issued Department of Commerce Order No. 140 in which he established the following organization to assist him "in the operation of the steel industry":

"1. The *Comptroller* for steel industry operations shall establish such systems of financial reporting and analyses as are needed in connection with the responsibilities of the Secretary in carrying out the above executive order and shall see that the affected com-

panies maintain such records and make such reports as these systems and analyses require;

[fol. 145] 2. The *Production Division* shall review and analyze reports from the operating managers in order to keep the Secretary informed as to the quantity and kind of steel being produced for national defense; supply information relative to the terms and conditions of employment under which the facilities are being operated; and furnish the Secretary with data necessary for him to report to the President on the actions he is taking, and the results of these actions in connection with the authority given him by Executive Order 10340;

3. The *Compliance Division* shall audit compliance with all orders and regulations issued by the Secretary in connection with steel industry operations; make such investigations and inspections as are necessary to the accomplishment of this objective; and formulate and recommend, in cooperation with the Solicitor, such corrective enforcement measures as are necessary and which are, in the opinion of the Attorney General, within the powers vested in the Secretary;

4. The *Solicitor* of the Department of Commerce shall serve as chief legal officer for steel industry operations, and shall furnish legal advice and assistance on actions taken in connection with the Government's operation of the steel industry; prepare necessary public orders and regulations for the approval of the Secretary and provide for their issuance and legal implementation; and assist in the preparation, review, and processing of communications relating to steel industry operations; and

5. The *Operating Managers' Liaison Officer* shall advise and assist the Secretary with respect to his transactions with the plant managers.

Aside from the above organization, the Secretary will utilize the existing staff and facilities of the Department of Commerce in the fulfillment of his responsibilities in connection with the operation of the steel industry."

On April 12, 1952, defendant announced that he had—

“no intention of considering or taking any action on the matter of terms or conditions of employment provided in the Executive Order of the President until after Mr. Steelman has reported that the pending negotiations between the management and labor representatives have been terminated” (Department of Commerce Release G-250, April 12, 1952).

[fol. 146] 5. Since defendant's seizure of plaintiff's plants and properties, plaintiff and the Union have continued negotiations under the offices of Mr. John R. Steelman, Acting Director of Defense Mobilization. These negotiations failed to result in an agreement. On April 15, 1952, Mr. Steelman terminated the negotiations as conducted through his offices. Shortly thereafter, on April 15, 1952, defendant issued the following statement:

“Inasmuch as the negotiations which had been going on between industry and labor have ended, I shall proceed, promptly but not precipitately, to consider the terms and conditions of employment as I was instructed to do in Paragraph 3 of the President's Executive Order. I have nothing further to say on the subject at this time” (Department of Commerce Release, G-251).

On April 18, 1952, defendant met with the steel operators, including plaintiff and the Union. Thereafter, late in the afternoon of April 18, 1952, defendant issued the following statement:

“Representatives of the operators and the Union each met with me today at my request. My purpose was to suggest to each of them that one final joint meeting be held of representatives capable of giving a final answer in an effort to get the government out of the steel business. Each side agreed to meet and the operators asked only that they be permitted some opportunity to clear questions with reference to what price allowances might be permitted in the event of a settlement.

"This question proving to be impossible of solution, in the time remaining today, I suggested to each side that the meeting be postponed until a later date. Meantime I feel that I should, under the President's directive, begin consideration of an action upon the terms and conditions of employment mentioned therein. After consultation with the President and with the Attorney General I propose to undertake to do this on Monday or Tuesday of next week."

[fol. 147] On Sunday, April 20, 1952, defendant appeared in a television broadcast "Meet the Press" in the course of which he stated categorically "There will certainly be some wage increases granted."

6. Defendant is ready to continue negotiations with the Union in order to settle its differences with the Union over terms and conditions of employment. I am informed and believe, however, that defendant, in accordance with his announcement set forth in paragraph 5 above, is about to act to put into effect certain wage increases and other benefits to be paid and provided by plaintiff to its employees, either by entering into an agreement with the Union or by directing plaintiff to put into effect such changes. Any such change will irreparably alter the bargaining position of the parties and will require plaintiff to disburse private funds to carry out such order of defendant, to its immediate and irreparable damage.

7. Press dispatches, which I believe to be reliable, state that defendant will deal only with the wage and fringe benefits involved in the dispute. These matters comprise six of the more than 100 issues involved in the dispute. In acting with respect to these issues, defendant would leave unresolved the many other issues, including issues of such extreme importance to the orderly and efficient operation of plaintiff's business as:

(a) whether or not plaintiff may adequately direct [fol. 148] the working forces in the interest of maintaining and improving the efficiency and safety of its operation, and

(b) whether or not plaintiff shall suffer loss of production and increased wage costs because of inability

to proceed with its program for installation of incentives as provided for in its agreement of May 8, 1946, with the Union, which agreement is still in full force and effect.

The other issues must be resolved before any agreement with the Union can be achieved. Defendant's threatened action will alter to the irreparable damage of plaintiff the bargaining position of the parties. Such action would also leave unresolved the demand of the Union for a Union Shop provision. Such a provision would affect the thousands of present employees who are not members of the Union, and such new employees as do not choose to join the Union, would impair the efficiency of plaintiff's entire operation, and would defeat plaintiff's traditional insistence upon freedom for its employees to choose whether or not to become Union members.

8. I have represented plaintiff and its predecessors in negotiations with the Union since 1942. I have never made an offer to settle any single issue except on condition that all the issues under negotiation be resolved. In my experience, the process of collective bargaining involves a weighing of all issues and a matter of trading concessions in one area for demands in another. It is not possible to [fol. 149] reach an over-all agreement by attempting to settle one issue at a time because these issues are inter-related and the importance of different issues is of vastly different weight to the Company and to the Union, respectively. The process of collective bargaining is the process of the settling of all issues as a "package." This is a principle of collective bargaining that cannot be violated. The placing into effect by defendant of increased wages and other benefits demanded by the Union would deprive plaintiff permanently of the use of concessions in these matters as a means of settling other issues in dispute.

9. By placing into effect new terms and conditions of employment, defendant would seriously impair plaintiff's statutory right to bargain collectively with the Union. This right is guaranteed to plaintiff by the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947, wherein Congress provided for the settlement

of labor disputes through the process of collective bargaining. Congress therein declared in Section 1 (b):

"It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, and to protect the rights of the public in connection with labor disputes affecting commerce."

In Sections 8 (a) (5) and 8 (b) (3) of this Act, Congress declared it an unfair labor practice for either an employer or a labor organization to refuse to bargain collectively, and [Vol. 50] in Section 8 (d) thereof declared that to bargain collectively was "the mutual obligation" of both the employer and the representative of its employees. Defendant, by imposing on plaintiff increased wage rates and other benefits without its consent, would deprive plaintiff of the rights guaranteed by this Act.

10. I am informed and believe that defendant is considering placing in effect the recommendations of the Wage Stabilization Board as to the terms and conditions of employment referred to in plaintiff's complaint herein, or some modification thereof, the precise nature of which I do not and necessarily cannot know. The increase in wage rates and other benefits recommended by the Wage Stabilization Board which defendant is considering ordering into effect, quite apart from their irreparable effect on plaintiff's future bargaining position, would impose on plaintiff tremendous out-of-pocket money costs. I have caused an examination to be made of the effect on plaintiff in added costs of operation of these changes in terms and conditions of employment, and have determined that added employment costs alone would exceed \$100,000,000 annually.

11. Plaintiff employs at its seized properties approximately 169,000 hourly rated production and maintenance employees represented by the Union. In addition to these employees directly affected by defendant's action with respect to terms and conditions of employment, plaintiff employs at its seized properties about 58,000 employees (here-

inafter termed "other employees"), some of whom are in other bargaining units represented by the Union, whose [fol. 151] terms and conditions of employment will, as a practical matter, be determined by defendant's action. During the past ten years, a large period of which was, as now, under Government controls, wage increases and other benefits granted to plaintiff's hourly rated production and maintenance employees have set the pattern for this group of other employees.

12. The Wage Stabilization Board recommended increased wage rates of $12\frac{1}{2}\text{¢}$ per hour as of January 1, 1952, $21\frac{1}{2}\text{¢}$ per hour as of July 1, 1952, and a further $21\frac{1}{2}\text{¢}$ per hour as of January 1, 1953. Such increases in wage rates would result in still greater increases in direct employment costs as a result of the compounding effects of other factors. The annual cost to plaintiff of increases directed by defendant and the resulting compounding effect of four of these factors, namely, overtime premium, vacation costs, payroll taxes and pensions for plaintiff's production and maintenance employees alone would total \$54,900,000 in 1952 and at rates effective January 1, 1953, \$69,800,000 in 1953. Comparable increases in employment costs for plaintiff's other employees would increase the total annual cost of the increased wage rates put into effect by defendant to \$79,700,000 in 1952 and at rates effective January 1, 1953, \$101,400,000 in 1953. Increases in employment costs which would inevitably result at plaintiff's other properties and at the properties of affiliated companies, would add more millions of dollars to the employment costs of plaintiff and its affiliates.

13. The Wage Stabilization Board recommended that 3-week paid vacations be granted to employees of 15 years' [fol. 152] standing instead of the present requirement of 25 years' employment for such vacations. These vacations for plaintiff's production and maintenance employees would result in increased employment costs of \$2,700,000 per year. The cost of comparable vacations for plaintiff's other employees will increase this annual cost to \$3,200,000.

14. The Wage Stabilization Board recommended that employees be granted six paid holidays per year and that employees who work on such holidays be paid double time

for time worked. At present, plaintiff grants no paid holidays but pays employees who work on six designated holidays time-and-one-half for time worked on such days. The cost of such increases would increase as the increases in wages contemplated by defendant become effective. At wage rates effective as of January 1, 1952, such paid holidays for plaintiff's production and maintenance employees would cost plaintiff \$11,400,000 annually and at rates which become effective January 1, 1953, such paid holidays would involve an annual cost of \$11,700,000. Comparable benefits for plaintiff's other employees would increase the total annual cost of these benefits to \$12,900,000 and \$13,200,000, respectively.

15. The Wage Stabilization Board recommended that plaintiff increase its shift differential of 4¢ for the second shift to 6¢ per hour and the differential of 6¢ for the third shift to 9¢ per hour. Such increased shift differentials would cost plaintiff \$4,800,000 annually for production and maintenance employees, or \$5,700,000 including other employees.

[fol. 153] 16. The Wage Stabilization Board recommended that, effective January 1, 1953, plaintiff pay time-and-one-quarter for work performed on Sundays. Sunday work is now compensated at the same rates as for other days of the week. This increase would increase plaintiff's employment costs annually \$13,200,000 beginning January 1, 1953. Including plaintiff's other employees, the annual cost of this benefit would total \$14,900,000.

17. The Tennessee Coal and Iron Division of plaintiff conducts an integrated operation for the production of steel products in the vicinity of Birmingham, Alabama. The wage scale at this southern operation is 10¢ per hour less than the wage scale in effect at other operations of the Company. The Wage Stabilization Board recommended that plaintiff reduce this southern differential to 5¢ per hour, a change which will result in increased employment costs for plaintiff's production and maintenance employees of \$1,800,000 annually. Including plaintiff's other employees, the annual cost of this benefit will total \$2,600,000.

18. The annual cost to plaintiff of the changes in terms of employment set forth in paragraphs 12 to 17 herein which

defendant arbitrarily and without right threatens to impose on plaintiff, would increase plaintiff's employment costs \$72,500,000 in 1952 and, at rates effective January 1, 1953, \$104,000,000 in 1953. Including plaintiff's other employees, the annual costs of these changes would total \$100,400,000 in 1952 and \$141,000,000 in 1953. In 1953, the added employment costs which defendant threatens to impose on plaintiff would average 29.8¢ per employee hour. [fol. 154] A detailed summary of these costs is attached as Exhibit A.

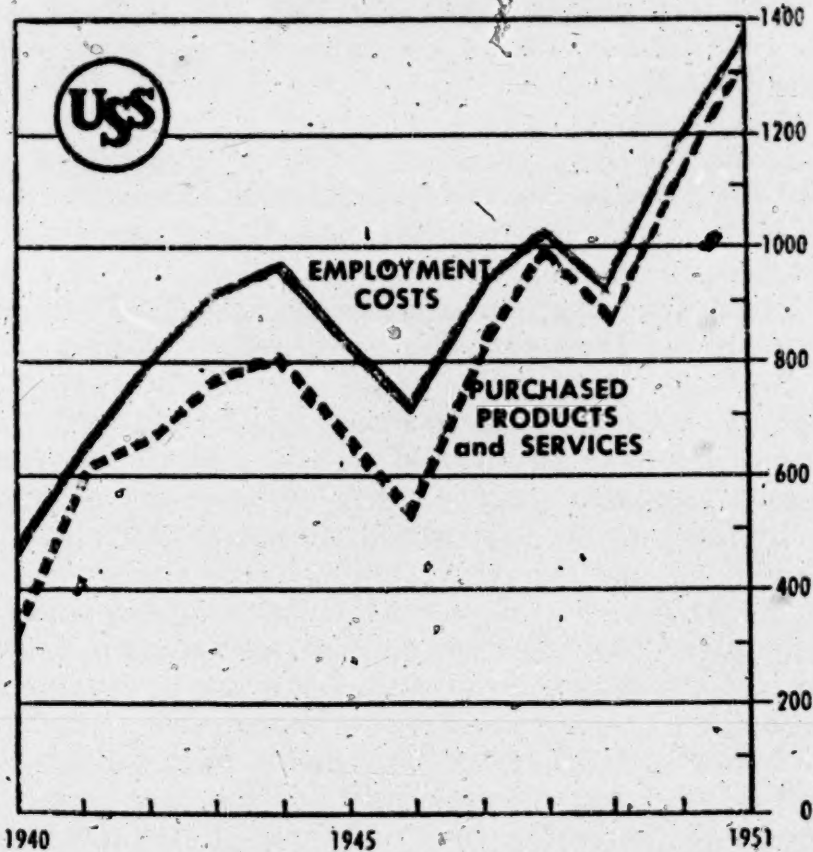
19. The ratios of costs of materials, supplies, and other products and services purchased by plaintiff and affiliated companies during the years 1947 to 1951, inclusive, have been as follows:

Date	Total Employment costs (\$ millions)	Products and Services Bought (\$ millions)	Ratio of Purchased Products and Services to Employment Costs
1947	\$903.6	\$839.4	93
1948	1,035.7	1,008.9	97
1949	945.9	885.7	94
1950	1,179.4	1,118.8	95
1951	1,374.5	1,327.9	97

Employment costs and costs of purchased products and services together represent approximately 80% of all costs of plaintiff. When wages are increased in the steel industry, they have always been similarly increased in other industries whose products the steel industry must buy, with the result that plaintiff's costs of products and services have advanced about the same dollar amount. It is an historical fact that these two great costs of plaintiff and affiliated companies move together, as illustrated in the chart opposite page:

EMPLOYMENT COSTS vs. PURCHASED PRODUCTS and SERVICES

MILLIONS OF DOLLARS



Plaintiff's costs of purchased products and services will increase in proportion to its wage cost increase. Therefore, based on past experience, the ultimate increases in costs to plaintiff resulting from defendant's action, will be on the order of double the increases in employment costs set forth in paragraph 18 herein.

[fol. 156] 20. Plaintiff in all of its integrated operations expends an average of 20 man hours of labor to produce each ton of steel products. Thus for every one cent of increase in average employment costs, production costs per ton of steel would increase by 20¢. The threatened action of defendant in increasing plaintiff's direct employment costs by 29.8¢ per employee hour will therefore increase

the average cost of steel products shipped by about \$6.00 per ton for such employment costs alone. The additional increase in costs of purchased products and services, as set forth in paragraph 16 herein, would result in a total increase in the average cost of steel products shipped of approximately \$12.00 per ton.

21. Plaintiff's products are subject to price regulations imposed by the United States. On April 16, 1952, Ellis Arnall, Director of Price Stabilization, testifying before the Senate Labor and Public Welfare Committee, reasserted his position that even if the wage increases recommended by the Wage Stabilization Board were put into effect, he would not approve a price increase for steel products based upon the increased wages and other additional costs resulting from granting the benefits in issue.

[fol. 157] 22. Defendant would impose on plaintiff a damaging cost-price squeeze which would impair the profitability of its operation; would make it difficult for plaintiff to meet its commitments in plant replacements and necessary improvements; and would diminish funds available for dividends and for reinvestment in the business.

23. Disbursements of plaintiff's funds would commence shortly after the effective date of defendant's order to place into effect new terms and conditions of employment. If defendant's order is effective immediately, changes in wage rates and other benefits would be required to be placed into operation by plaintiff for the next pay period commencing thereafter, or if only one or two days of the current pay period have elapsed, with the current pay period.

24. I am advised by counsel that defendant's seizure of plaintiff's properties and defendant's threatened action to place in effect changes in terms and conditions of employment above set forth are without basis in law. Once such increased benefits are granted to plaintiff's employees as a practical matter they cannot be taken away. A company conducting a business as extensive and comprehensive as that of this plaintiff, with its employees represented by a large and powerful union, could obtain a general reduction of wages, except under changed economic conditions, only at the expense of either permanent dissatisfaction of the great body of its employees or a

strike. During the past 15 years there has not been a single general reduction in the wage scale of plaintiff's employees or in fringe benefits. The placing into effect, in accordance with orders of defendant, of new terms and conditions of employment determined by defendant will result in immediate and irreparable injury to plaintiff.

John A. Stephens.

Sworn to and subscribed before me this 23rd day of April, 1952. Margaret MacPherson, Notary Public. My Commission expires March 14, 1957.
[Seal.]

[File endorsement omitted.]

[fol. 159] EXHIBIT A TO AFFIDAVIT OF JOHN A. STEPHENS

Estimated Additions to Employment Costs of Wage and Fringe Adjustments
Recommended by the Wage Stabilization Board Which Defendant Threatens
To Impose on Plaintiff*

Operations of United States Steel Company and General Operating Divisions
Seized by Defendant

Period and item	Year 1952 Production and main- tenance employees		All employees	
	Per Man- hour	Total (\$ millions)	Per Man- hour	Total (\$ millions)
January 1, 1952-March 31, 1952:				
Wage increase, 12½¢ (Par. 12)	14.5¢	\$12.5	15.3¢	\$18.1
Vacations (Par. 13)	.7	.6	.7	.8
Southern Differential (Par. 17)	.5	.4	.6	.6
Subtotal	15.7	13.5	16.6	19.5
April 1, 1952-June 30, 1952:				
Wage increase, 12½¢	14.5	12.5	15.3	18.1
Vacations	.7	.6	.7	.8
Southern Differential	.5	.4	.6	.6
Holiday Pay (Par. 14)	2.2	1.9	1.8	2.1
Shift Differential (Par. 15)	1.4	1.2	1.2	1.4
Subtotal	19.3	16.6	19.6	23.0
July 1, 1952-December 31, 1952:				
Wage increase, 15¢	17.3	29.9	18.3	43.5
Vacations	.7	1.4	.7	1.5
Southern Differential	.5	1.0	.6	1.4
Holiday Pay	4.5	7.7	3.7	8.7
Shift Differentials	1.4	2.4	1.2	2.8
Subtotal	24.4¢	\$42.4	24.5¢	\$57.9
Total, Year 1952	20.9¢	\$72.5	21.2¢	\$100.4
Summary—Year 1952:				
Wage Increase (Av. 13¼¢)	15.9¢	\$54.9	16.8¢	\$79.7
Vacations	.7	2.6	.7	3.1
Southern Differential	.5	1.8	.66	2.6
Holiday Pay	2.8	9.6	2.2	10.8
Shift Differentials	1.0	3.6	.9	4.2
Total	20.9¢	\$72.5	21.2¢	\$100.4

Year 1953
(At rates effective January 1, 1953)

Wage Increase, 17½¢	20.2¢	\$69.8	21.4¢	\$101.4
Vacations	.8	2.7	.7	3.2
Southern Differential	.5	1.8	.6	2.6
Holiday Pay	3.4	11.7	2.8	13.2
Shift Differentials	1.4	4.8	1.2	5.7
Premium for Sunday Work (Par. 16)	3.8	13.2	3.1	14.9
Total	30.1¢	\$104.0	29.8¢	\$141.0

* For purposes of this table, the effective date for holiday pay (see par. 14) and the increased shift differential (see par. 15) is assumed to be April 1, 1952.

[fol. 160] UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION—Filed April 25, 1952

Defendant opposes the granting of a preliminary injunction on the following grounds, viz:

1. The breakdown of collective bargaining negotiations in the steel industry, resulting in the action of the steel companies in cooling off their furnaces in anticipation of suspension of manufacture and the action of the union in calling a strike to begin at 12:01 a.m. on April 9, 1952, created an immediately impending national emergency because interruption of steel manufacture for even a brief period would seriously endanger the well-being and safety of the United States in a critical situation.

2. The President of the United States of America has inherent power in such a situation to take possession of the steel companies in the manner and to the extent which he did by his Executive Order of April 8, 1952. This power is supported by the Constitution, by historical precedent, and by court decisions.

3. The courts are without power to negate executive action of the President of the United States of America by enjoining it and by enforcing their injunctions by imprisonment or other process against the President.

[fol. 161] 4. The granting of a preliminary injunction is never a matter of right. The courts, even as between private parties, will not interfere in advance of a full hearing on the merits except upon a showing that the damage to flow from a refusal of a temporary injunction is irreparable and outweighs the harm which would result from a denial of the temporary injunction. When, as in the present case, the interest of the public is involved, the courts are particularly hesitant to interfere.

5. Since the management of the steel companies is left in control under the arrangements which existed as of the time of taking, and since the right of the companies to recover all damages resulting from the taking has been rec-

ognized by Supreme Court decisions, there is no showing that the companies' legal remedy is inadequate or that their injury is irreparable, and hence the companies have not met the conventional conditions precedent to the granting of the kind of order they request.

This opposition is based on the affidavits of Robert A. Lovett, Secretary of Defense, Gordon Dean, Chairman of the United States Atomic Energy Commission, Manley Fleischman, Administrator of the Defense Production Administration, Henry H. Fowler, Administrator of the National Production Authority, Oscar L. Chapman, Secretary of the Interior, Jess Larson, Administrator of General Services, Homer C. King, Acting Administrator of the Defense Transportation Administration, Charles Sawyer, Secretary of Commerce, Harry Weiss, Executive Director of the Wage Stabilization Board and Nathan P. Feinsinger, Chairman of the Wage Stabilization Board filed herewith, [fol. 162] and on the defendant's memorandum of points and authorities filed herewith, all of which are by reference made a part hereof.

A. Holmes Baldridge, Per M. C. T., Assistant Attorney General; Marvin C. Taylor, J. Gregory Bruce, Per M. C. T., Attorneys, Department of Justice.

[File endorsement omitted.]

[fol. 163] Executive Order
[Omitted. Printed side page 8 ante.]

[fol. 173] Telegram
[Omitted. Printed side page 38 ante.]

[fol. 175] Order No. 1
[Omitted. Printed side page 40 ante.]

[fol. 181] Affidavits
[Omitted. Printed side page 46 et seq. ante.]

[fol. 226] [Proof of service omitted in printing.]

[fol. 229] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO WITHDRAW VERBAL AMENDMENT AND TO PROCEED
ON THE BASIS OF MOTION FOR PRELIMINARY INJUNCTION
FILED APRIL 18, 1952—Filed April 29, 1952

Plaintiff, United States Steel Company, hereby moves the Court to withdraw its verbal amendment as to relief sought on preliminary motion and to proceed on the basis of its original motion for preliminary injunction filed April 18, 1952.

This motion is filed pursuant to the opinion of this Court in this matter filed this date.

Howard C. Westwood, Attorney for Plaintiff, 701
Union Trust Bldg., Washington, D. C.

[Penned notation:] Same granted.—Pine.

[fol. 869]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

Civil Action No. 1549-'52

BETHLEHEM STEEL COMPANY (Pa.), 701 E. 3rd St., Bethlehem, Pa.; Bethlehem Steel Company (Del.), 100 W. 10th St., Wilmington, Del.; Bethlehem Pacific Coast Steel Corporation, 701 E. 3rd St., Bethlehem, Pa.; Buffalo Tank Corporation, 153 Lincoln St., Lackawanna, N. Y.; Bethlehem Supply Company, 100 W. 10th St., Wilmington, Del.; Bethlehem Supply Company of California, San Francisco County, Calif.; Bethlehem Cornwall Corporation, 701 E. 3rd St., Bethlehem, Pa.; Bethlehem Quarry Company, State Highway No. 91, Village of Barrackville, W. Va.; and The Dundalk Company, Shipping Place, Dundalk, Md., Plaintiffs,

against

CHARLES SAWYER, Individually and as Secretary of Commerce of the United States of America, Washington, D. C., Defendant

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF—Filed April 9, 1952

The plaintiffs, for their complaint herein, allege:

1. This is an action for a declaratory judgment and for a permanent injunction and other relief, brought pursuant to the provisions of the Act of June 25, 1948, c. 646, 62 Stat. 964, as amended by the Act of May 24, 1949, c. 139, § 111, 63 Stat. 105 (28 U. S. C. A. §§ 2201 and 2202). There is now existing between the parties an actual controversy, justiciable in character, in respect of which the plaintiffs need a declaration of their rights by this Court.

2. The plaintiffs herein are as follows:

[fol. 870] (a) Bethlehem Steel Company (Pa.) is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, with an office and post office address at 701 East Third Street, Bethlehem, Pennsylvania.

(b) Bethlehem Steel Company (Del.) is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with an office and post office address at 100 West Tenth Street, Wilmington, Delaware.

(c) Bethlehem Pacific Coast Steel Corporation is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with an office and post office address at 701 East Third Street, Bethlehem, Pennsylvania.

(d) Buffalo Tank Corporation is a corporation organized and existing under and by virtue of the laws of the State of New York, with an office and post office address at 153 Lincoln Street, Lackawanna, New York.

(e) Bethlehem Supply Company is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with an office and post office address at 100 West Tenth Street, Wilmington, Delaware.

(f) Bethlehem Supply Company of California is a corporation organized and existing under and by virtue of the laws of the State of California, with an office in and post office address at San Francisco County, California.

(g) Bethlehem Cornwall Corporation is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, with an office and post office address at 701 East Third Street, Bethlehem, Penn-
[fol. 871] sylvania.

(h) Bethlehem Quarry Company is a corporation organized and existing under and by virtue of the laws of the State of West Virginia, with an office and post office address at State Highway No. 91, Village of Barrackville, West Virginia.

(i) The Dundalk Company is a corporation organized and existing under and by virtue of the laws of the State of Maryland, with an office and post office address at Dundalk Shipping Place, Dundalk, Maryland.

3. The defendant Charles Sawyer is Secretary of Commerce of the United States of America and is a resident of the District of Columbia.

4. The action arises out of the promulgation by the President of the United States of Executive Order No. . . . purporting to seize certain steel-producing properties of the plain-

tiffs, which order of seizure is violative of The Constitution of the United States and without authority in any law or statute of the United States presently in force and effect. The amount in controversy exceeds, exclusive of interests and costs, the sum of \$3,000.

5. Each of the plaintiffs is an operating company, with business consisting chiefly of managing and operating various iron and steel producing and manufacturing plants, structural fabricating works and quarries located in various States of the United States. The properties of each of the plaintiffs are as follows:

(a) The iron and steel producing and manufacturing plants operated by Bethlehem Steel Company (Pa.) are the Bethlehem Plant (located at Bethlehem, Pennsylvania), the Johnstown Plant (located at Johnstown, Pennsylvania), the Sparrows Point Plant (located at Sparrows Point, [fol. 872] Maryland), the Lackawanna Plant (located at Lackawanna, New York), the Steelton Plant (located at Steelton, Pennsylvania), the Lebanon Plant (located at Lebanon, Pennsylvania) and the Williamsport Plant (located at Williamsport, Pennsylvania). The structural fabricating works operated by Bethlehem Steel Company (Pa.) are located at Bethlehem, Johnstown, Steelton, Pottstown, Rankin and Leetsdale, Pennsylvania, and at Buffalo, New York. Bethlehem Steel Company (Pa.) also operates the Bethlehem Quarry (located at Bethlehem, Pennsylvania).

(b) The structural fabricating works operated by Bethlehem Steel Company (Del.) are located at Chicago, Illinois. Bethlehem Steel Company (Del.) also operates the Boston Warehouse (located at Boston, Massachusetts) and the Chicago Warehouse (located at Chicago, Illinois).

(c) The iron and steel producing and manufacturing plants operated by Bethlehem Pacific Coast Steel Corporation are the Los Angeles Plant (located at Vernon, California), the Seattle Plant (located at Seattle, Washington) and the South San Francisco Plant (located at South San Francisco, California). The structural fabricating works operated by Bethlehem Pacific Coast Steel Corporation are located at Alameda, Los Angeles and South San Francisco, California, and at Seattle, Washington.

(d) The manufacturing plants operated by Buffalo Tank Corporation are the Buffalo Plant (located at Buffalo, New York), the Charlotte Plant (located at Charlotte, North Carolina), and the Dunellen Plant (located at Dunellen, New Jersey).

(e) The manufacturing plants operated by Bethlehem [fol. 873] Supply Company are the Corsicana Plant (located at Corsicana, Texas) and the Tulsa Plant (located at Tulsa, Oklahoma).

(f) The properties operated by Bethlehem Supply Company of California are located at Los Angeles, California.

(g) The properties operated by Bethlehem Cornwall Corporation are located at Cornwall Borough, Pennsylvania, and at Lebanon, Pennsylvania.

(h) The properties operated by Bethlehem Quarry Company are located at Hanover, Naginey and Steelton, Pennsylvania.

(i) The properties operated by The Dundalk Company are located at Dundalk and Sparrows Point, Maryland.

6. Not any of the plaintiffs has received from the President of the United States, from the Atomic Energy Commission or from any Government agency any order for materials placed pursuant to the provisions of Section 468(a) of the Universal Military Training and Service Act of 1951 (50 U. S. C. A. App. § 468).

7. At each of the iron and steel producing and manufacturing plants, structural fabricating works and quarries operated by the plaintiffs and referred to in par. 5 hereof, there are employees represented by the Union Steelworkers of America (hereinafter called the Union) for purposes of collective bargaining.

8. At all relevant times prior to April 9, 1952, the plaintiffs had enjoyed peaceful possession and the exclusive operation of the properties referred to in par. 5 hereof and had operated the same in all respects consistent with applicable laws of the United States and of the various States of the United States having jurisdiction thereof.

[fol. 874] 9. On December 31, 1951, the several contracts which had theretofore been in effect between the plaintiffs and the Union covering, among other things, wages and terms and conditions of employment, expired. Prior to

that date negotiations between the plaintiffs and the Union looking toward the execution of further such contracts had been commenced.

10. Continued negotiations between the plaintiffs and the Union having been unproductive, the president of the Union issued an ultimatum stating that at 12:01 A.M. on April 9, 1952, all employees represented by the Union and working at the iron and steel producing and manufacturing plants, structural fabricating works and quarries of the plaintiffs would be ordered to, and would, discontinue their work for the plaintiffs and would thereafter engage in an organized strike against the plaintiffs.

11. On April 9, 1952, the President of the United States promulgated Executive Order No. , a copy of which is annexed hereto as Exhibit A, directing the seizure by the defendant of the properties of the plaintiffs referred to in par. 5 hereof.

12. The Congress has provided in the Labor Management Relations Act of 1947 specific and adequate machinery for the adjustment of the proposed strike and has specifically rejected the device of seizure as a means of settling the same.

13. Executive Order No. and the actions of the defendant herein taken or to be taken in pursuance thereof are without authority under any presently existing statute of, [fol. 875] or any provision of The Constitution of, the United States and are invalid, unlawful and without effect.

14. The actions of the defendant taken or to be taken in pursuance of said Executive Order have already affected, and will continue adversely and irreparably to affect, the business of the plaintiffs in that

(a) said seizure will result in the disruption of normal customer relationships between the plaintiffs and their customers, the great majority of whom have pending orders with the plaintiffs for steel and steel products usable and to be used in the civilian economy of the United States having no relation to any war effort of the United States;

(b) said seizure will give to the defendant access to confidential information and trade secrets in the files of the plaintiffs with regard to the business of

the plaintiffs and their many customers in the United States;

(c) said seizure, being unlawful, will deprive the plaintiffs of their properties without due process of law and the plaintiffs will have no adequate remedy at law;

(d) said seizure will deprive the plaintiffs of their rights to bargain collectively with their employees and will constitute an unlawful interference therewith, for which there is no adequate remedy at law; and

(e) said seizure will threaten the plaintiffs and their directors, officers, agents and employees with criminal penalties in relation to any action taken by them to resist said unlawful seizure.

[fol. 876] Wherefore, the plaintiffs pray:

(a) that this Court decree that Executive Order No. is without authority under any law of the United States or under The Constitution of the United States and is, therefore, invalid and void;

(b) that this Court decree that all action taken by the defendant pursuant to said Executive Order is invalid, unlawful and without effect;

(c) that this Court, pending final hearing and determination of this action, enter an order granting an interlocutory injunction restraining the defendant, and his successor or successors in office, his assistants, employees, agents and other persons acting under his control and authority, (i) from taking any steps whatsoever to effectuate and carry out the provisions of Executive Order No. promulgated by the President of the United States in so far as said Executive Order is intended to apply to the plaintiffs herein, their officers, agents and the managements of their properties, (ii) from molesting or interfering with or doing any act or thing which would prevent or tend to prevent the plaintiffs, their officers, agents and employees, from operating the plaintiffs' properties for their own account, (iii) from in any respect changing the wages or other terms or conditions of employment in effect at the properties of the plaintiffs at the time of promulgation of said Executive Order and (iv) from interfering in any other way with the

plaintiffs' contractual relations with others or with the plaintiffs' rights of ownership of their businesses and properties;

(d) that this Court, upon final hearing and determination [fol. 877] of this action, enter a decree permanently enjoining the defendant, and his successor or successors in office, his assistants, employees, agents and other persons acting under his control and authority, (i) from taking any steps whatsoever to effectuate and carry out the provisions of Executive Order No. 9805 promulgated by the President of the United States in so far as said Executive Order is intended to apply to the plaintiffs herein, their officers, agents and the managements of their properties, (ii) from molesting or interfering with or doing any act or thing which would prevent or tend to prevent the plaintiffs, their officers, agents and employees, from operating the plaintiffs' properties for their own account, (iii) from in any respect changing the wages or other terms or conditions of employment in effect at the properties of the plaintiffs at the time of promulgation of said Executive Order and (iv) from interfering in any other way with the plaintiffs' contractual relations with others or with the plaintiffs' rights or ownership of their businesses and properties; and

(e) that the plaintiffs have such other and further relief as to the Court may seem just and proper.

April 9, 1952.

Cravath, Swaine & Moore, by Bruce Bromley, a Member of said Firm, 15 Broad Street, New York 5, N. Y.; Wilmer & Broun, by E. Fontaine Broun, a Member of said Firm, 616-623 Transportation Bldg., Washington 6, D. C., Attorneys for the Plaintiffs.

[fols. 878-878a] *Duly sworn to by Arthur Hillebrant. Jurat omitted in printing.*

[fol. 879]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT—Filed April 9, 1952

STATE OF NEW YORK,

County of New York, ss.:

R. E. McMATH, being duly sworn, deposes and says:

1. I am a Vice-President of each of the corporations which are named above as plaintiffs in this action, except The Dundalk Company, of which I am President.

2. This affidavit is made in support of the application of the plaintiffs for an interlocutory injunction restraining and enjoining the operation and enforcement of Executive Order , made by the President of the United States on April 9, 1952, which is the basis of this action, and the application of the plaintiffs for a temporary restraining order pending decision upon the aforesaid application. The statements hereinafter set forth are true to the best of my knowledge, information and belief.

3. The plaintiffs are engaged in the steel business or in [fol. 880] businesses ancillary to the steel business. Plaintiff Bethlehem Steel Company (Pa.) owns and operates steel plants or manufacturing plants at Bethlehem, Johnstown, Lebanon, Steelton and Williamsport, Pennsylvania, Sparrows Point, Maryland, and Lackawanna, New York, and fabricating works at Bethlehem, Johnstown, Leetsdale, Pottstown, Rankin and Steelton, Pennsylvania, and Buffalo, New York, and operates a limestone quarry at Bethlehem, Pennsylvania, which is owned by an affiliated company. Plaintiff Bethlehem Steel Company (Del.) owns and operates a fabricating works at Chicago, Illinois, and warehouses at Boston, Massachusetts, and Chicago, Illinois. Plaintiff Bethlehem Pacific Coast Steel Corporation owns and operates steel plants at South San Francisco and Vernon, California, and Seattle, Washington, and fabricating works at Alameda, Los Angeles and South San Francisco, California, and Seattle, Washington. Plaintiff Buf-

falo Tank Corporation owns and operates manufacturing units at Buffalo, New York, Charlotte, North Carolina, and Dunellen, New Jersey. Plaintiff Bethlehem Supply Company owns and operates manufacturing units at Corsicana, Texas, and Tulsa, Oklahoma. Plaintiff Bethlehem Supply Company of California operates properties at Los Angeles, California. Plaintiff Bethlehem Cornwall Corporation operates iron ore properties in Cornwall Borough, Pennsylvania, and an iron ore concentrating and sintering plant at Lebanon, Pennsylvania, which are owned by an affiliated company. Plaintiff Bethlehem Quarry Company operates quarries at Hanover, Naginoy and Steelton, Pennsylvania, which are owned by an affiliated company. Plaintiff The Dundalk Company operates properties at Dundalk and Sparrows Point, Maryland, which are owned by an [fol. 881] affiliated company.

4. All of said plants, fabricating works, manufacturing units, warehouses, quarries and properties have been or are about to be seized under the provisions of the Executive Order aforesaid, and plaintiffs thereby have been or will be deprived of the possession, control, and use of said properties to the detriment of the plaintiffs.

5. I have caused an examination to be made of the relations between the plaintiffs and the Government of the United States in respect of the obligation and duties of the plaintiffs, whether arising by contract or otherwise, to furnish articles or materials to that Government. As a result of such examination I find that neither the President of the United States nor any person acting under his authority has placed under the provisions of Section 18 of the Selective Service Act of 1948, as amended (62 Stat. 604, 625, 50 U.S.C.A. App. § 468) any order for any articles or materials for the use of the Armed Forces of the United States or for the use of the Atomic Energy Commission.

6. Said seizure is predicated solely upon the situation arising out of a labor dispute between the plaintiffs and United Steelworkers of America (hereinafter called the Union), which represents substantially all the production and maintenance employees of the plaintiffs for purposes of collective bargaining in respect of rates of pay, wages, hours of employment and other conditions of employment. On December 22, 1951, the President of the United States

referred said dispute to the Wage Stabilization Board, an executive agency created by Executive Order 10233 (16 F.R. 3503). Extensive hearings were held, in which the [fol. 882] plaintiffs voluntarily participated, and on March 20, 1952, the Wage Stabilization Board submitted to the President of the United States its report and recommendations. Said recommendations include increases in wage rates of $12\frac{1}{2}$ cents per hour as of January 1, 1952, $2\frac{1}{2}$ cents per hour as of July 1, 1952, and $2\frac{1}{2}$ cents per hour as of January 1, 1953, various so-called "fringe" benefits and the inclusion of a union-shop provision in the new collective bargaining agreements between the plaintiffs and the Union. The officials of the plaintiffs estimate that, if such recommendations shall be put into or continued in effect, the increases in wage rates and the "fringe" benefits recommended would increase the direct employment costs of the plaintiffs by about 30 cents per employee-hour and, based upon the experience of the plaintiffs in the past, would increase total costs by about 60 cents per employee-hour and would increase by \$12 the total costs of each ton of steel products shipped. The plaintiffs, therefore, cannot afford to agree to such recommendations.

7. I am advised by counsel for the plaintiffs that said recommendations of the Wage Stabilization Board are not of any legal effect and cannot in any way be construed as binding upon the plaintiffs. Nevertheless, because of the failure of the plaintiffs to agree to accept such recommendations without compensating price increases, the President of the United States has now seized or is about to seize the plants and other facilities and properties used by the plaintiffs in the operation of their businesses and threatens, over the protests of the plaintiffs, to put such recommendations into effect and continue them in effect [fol. 883] and thereby yield to the Union increases in wage rates and other benefits which the plaintiffs refused to grant even in the face of a strike. The plaintiffs are thereby threatened with irreparable injury.

8. If said recommendations shall be put into or continued in effect, irreparable injury will result and continue to result even after their properties shall have been returned to them. That is clear, because as a practical matter it would be impossible for the plaintiffs, upon the return of

their properties to them, to recede from the increased wage rates and other "fringe" benefits and to cancel the union-shop provisions which will be put into effect by the acceptance of said recommendations. It is idle to argue otherwise, and the plaintiffs will be saddled with wage rates and employment conditions from which they will be unable to retreat and which they have found it impossible to grant. Moreover, they will also be saddled with the union shop which is not only unnecessary, but, as the plaintiffs believe, undemocratic. Such injury will be directly attributable to the action of the Government against which the plaintiffs will not have any adequate legal recourse.

9. The carrying into effect of said Executive Order is closely comparable to the action which the Government took in the bituminous coal industry in 1946, of which I have personal knowledge as a Vice-President of a coal-mining corporation whose properties the Government seized. By Executive Order No. 9728 (11 F. R. 5593) President Truman seized the coal mines on May 21, 1946, under the provisions of the War Labor Disputes Act (57 Stat. [fol. 884] 163), and seven days later the Secretary of the Interior made an agreement with the United Mine Workers (the so-called Krug-Lewis Agreement) which the owners of the seized mines were forced to assume as a condition to the return of their properties to them.

10. The seizure of the properties of the plaintiffs will cause the plaintiffs irreparable injury in many other respects, of which the following are examples: .

(a) The steel industry is a highly competitive business and the plaintiffs have many trade secrets and methods of doing business which are confidential and which the plaintiffs would not under any circumstances be willing to have revealed to their competitors. The agents of the Government in control of the properties of the plaintiffs will have access to such secrets and methods and there is grave danger that they may be revealed to the competitors of the plaintiffs and to others who will not have any right to information regarding them.

(b) The plaintiffs over the years have built up substantial relationships with their customers and during the current national defense effort have done their best

to maintain such relationships in a way consistent with the requirements of the national defense effort. During any period of Government seizure, the business of the plaintiffs will be subject to the control of Government agents who will not have any particular reason for protecting such relationships and there is grave danger that such relationships will be impaired to the irreparable detriment of the plaintiffs.

[fols. 885-900] (c) The business of the plaintiffs is highly integrated and requires the constant attendance of persons who are thoroughly experienced in the operation of the business. During any period of Government control, the operation of the business will be subject to the orders of Government agents, many of whom, doubtless, will not have any experience whatsoever in the operation of steel plants and related facilities. There is grave danger that the seized plants and other facilities of the plaintiffs will be irreparably harmed by the orders of such agents.

11. A previous application has not been made for the relief herein requested or for similar relief.

R. E. McMath.

Subscribed and sworn to before me this 9th day of April, 1952. Joseph W. Marlow, Notary Public.

[fol. 901]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR A TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE—Filed April 9, 1952

Now come the plaintiffs by their counsel and respectfully move this Honorable Court, pursuant to Rule 65(a) and (b) of the Federal Rules of Civil Procedure, for a temporary restraining order and order to show cause, based upon the annexed complaint, verified on April 9, 1952, and upon the

annexed affidavit of R. E. McMath, sworn to on April 9, [fol. 902] 1952, and the facts therein set forth, and upon the statement of points and authorities submitted herewith.

April 9, 1952.

Cravath, Swaine & Moore, by Bruce Bromley, a Member of Said Firm, 15 Broad Street, New York 5, N. Y.; Wilmer & Broun, by E. Fontaine Broun, a Member of Said Firm, 616-623 Transportation Bldg., Washington 6, D. C., Attorneys for the Plaintiffs.

Proof of service (omitted in printing).

[fols. 903-904] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER—Filed April 10, 1952

This cause came on to be heard on April 9, 1952, and the Court after hearing the arguments of counsel for the parties and being of the opinion that plaintiff's application for a temporary restraining order should be denied, it is hereby

Ordered that plaintiff's application for a temporary restraining order be, and the same hereby is, denied.

Alexander Holtzoff, United States District Judge.

Dated this, the 10th day of April, 1952.

[fol. 905] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR PRELIMINARY INJUNCTION—Filed April 18, 1952

Now come the plaintiffs by their counsel, and upon the affidavit of R. E. McMath, sworn to on April 9, 1952, and

the verified complaint, each filed herein, and the facts set forth in each thereof, and upon the statement of points and authorities submitted herewith, respectfully apply to this Honorable Court, pursuant to Rule 65 of the Federal Rules of Civil Procedure, for a preliminary injunction, enjoining and restraining the defendant herein, and his successor or successors in office, his officers, agents, assistants, servants, employees, and attorneys, and other persons acting under his control or authority, and those persons in active concert or participation with any of them, (i) from taking any steps whatsoever to effectuate and carry out the provisions of Executive Order No. 10340 promulgated by the President of the United States in so far as said Executive Order is intended to apply to the plaintiffs herein, their officers, agents and the managements of their properties, (ii) from molesting or interfering with or doing any act or [fols. 906-908] thing which would prevent or tend to prevent the plaintiffs, their officers, agents and employees, from operating the plaintiffs' properties for their own account, (iii) from in any respect changing the rates of pay or other terms or conditions of employment of employees of the plaintiffs in effect at the properties of the plaintiffs at the time of the promulgation by the President of the United States on April 8, 1952, of said Executive Order and (iv) from interfering in any other way with the plaintiffs' contractual relations with others or with the plaintiffs' rights of ownership of their businesses and properties.

April 18, 1952.

Cravath, Swaine & Moore, by Bruce Bromley, a Member of said Firm, 15 Broad Street, New York 5, N. Y.; Wilmer & Brown, by E. Fontaine Brown, a Member of said Firm, 616-623 Transportation Bldg., Washington 6, D. C., Attorneys for the Plaintiffs.

[fol. 909]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT—Filed April 23, 1952

DISTRICT OF COLUMBIA, ss:

Bruce Bromley, being duly sworn, deposes and says:

1. I am a counsel for each of the corporations named as the plaintiffs in this action.

2. This affidavit is made by me in support of the motion of the plaintiffs for a preliminary injunction filed herein on April 18, 1952. The statements hereinafter set forth are true to the best of my knowledge, information and belief.

3. On April 9, 1952, R. E. McMath executed an affidavit in support of an application of the plaintiffs for a temporary restraining order in respect of the operation and enforcement of Executive Order No. 10340. That affidavit was filed with this Court on April 9, 1952, and reference is hereby respectfully made, in the interest of brevity, to the statements sworn to in that affidavit as if set forth in full herein as a part of this affidavit.

4. I am advised that the defendant threatens to enter into a contract with the United Steel Workers of America or issue an order by which rates of pay and other terms and [fol. 910] conditions of employment of employees in effect at the properties of the plaintiffs at the time of promulgation by the President of the United States of said Executive Order are to be changed to conform with certain of the various recommendations made by the Wage Stabilization Board, which recommendations are not in any way otherwise binding upon the plaintiffs.

5. My information with regard to such threatened changes in rates of pay and other terms or conditions of employment of said employees is the same as that which is set forth in detail in an affidavit in the Civil Action now pending in this Court, *United States Steel Company v. Sawyer*, No. 1625-52, sworn to on April 23, 1952, of John A. Stephens, Vice President—Industrial Relations, United States Steel Company,

who was Chairman of a committee authorized by numerous steel companies, including Bethlehem Steel Company, to coordinate and expedite presentations on their behalf before a special panel of the Wage Stabilization Board and later Chairman of a committee representing Bethlehem Steel Company, among others, in negotiations with United Steel Workers of America. Reference is hereby respectfully made in the interest of brevity to the statements with respect to such threatened changes which are made in said affidavit and which are hereby incorporated by reference herein as if fully set forth herein as a part of this affidavit.

6. Action of the defendant in putting into effect the recommendations of the Wage Stabilization Board would immediately and immeasurably increase the cost of manufacturing the steel products which are produced at the properties of the plaintiffs. Such recommendations include a recommendation that, retroactive to January 1, 1952, a general increase of $12\frac{1}{2}\%$ per hour be made effective in the rates of pay of employees at the properties of the plaintiffs. It is estimated that the direct cost of such increase to the plaintiffs would be 13.9¢ per employee hour. In addition, should the defendant direct the putting into effect at said [fol. 911] properties of certain fringe benefits, including paid holidays, increased vacation benefits and increased shift differentials, the estimated direct cost thereof would be 5.7¢ per employee hour. Thus, the action of the defendant could result in an immediate direct increase in employment costs of nearly 20¢ per employee hour. Furthermore, based upon the experience of the plaintiffs in the past, a general wage increase in the steel industry is usually followed by corresponding wage increases in other industries, including those which furnish materials, supplies and services to the steel industry. Consequently it is estimated that the plaintiffs will incur substantial increases in costs in addition to the estimated direct cost of giving effect to the recommendations of the Wage Stabilization Board. The Government has not, however, allowed any compensating increases in the prices of the steel products that are manufactured at the plants of the plaintiffs and which are subject to price controls imposed by the Government under the provisions of the Defense Production Act of 1950, as amended. The Director of the Office of Price Stabilization,

which is charged with the administration of such controls, stated on April 2, 1952, that the plaintiffs are entitled only to a price increase of between \$2 and \$3 per ton under the provisions of the so-called Capehart amendment to the Defense Production Act (50 U. S. C. A. App. § 2102 (d) (4)) and that the application of pricing standards employed by the Office of Price Stabilization would not result in any increase in the price of the steel products manufactured by the plaintiffs in addition to that which is allowable, and to which the plaintiffs are entitled, under the so-called Capehart amendment, and he reiterated that position on April 16, 1952. During the calendar year 1951 the plaintiffs shipped 12,138,732 net tons of roller steel and other finished products and produced 16,405,677 net tons of steel ingots [fol. 912] and castings. It is probable that the amount of such shipments and production will be increased during the current year. Moreover, the recommendations of the Wage Stabilization Board provide for further increases in wage rates of 2 1/2¢ per hour effective July 1, 1952, and January 1, 1953. It is thus apparent that the putting into effect of recommendations of the Wage Stabilization Board by the defendant would result in a real and immeasurable increase of many millions of dollars in the cost of producing and shipping the products of the plaintiffs with respect to which the Office of Price Stabilization has refused to allow price increases which would permit the plaintiffs to recoup such increased costs.

7. If the Court shall ultimately determine in this action, as I feel it must, that the defendant is without authority to seize the properties of the plaintiffs and, consequently, without authority to put into effect the recommendations of the Wage Stabilization Board, the plaintiffs are threatened with irreparable injury because it is obvious that defendant as an individual would not be financially able to pay judgments to cover the increased costs of the plaintiffs with respect to which they would not be allowed any compensating price increases. In any event, plaintiffs do not have any assurance that they will recover full and adequate compensation in that regard from the United States and they will be forced to resort to innumerable actions at law over an indefinite period of time to assert whatever legal rights they may have to recover such compensation.

8. As a practical matter it will be impossible for the plaintiffs, when their properties shall be returned to them, to recede from the increased wage scale and other "fringe" benefits and any other terms and conditions of employment which the defendant threatens to order them to put into effect.

9. The taking by the defendant of any action changing [fol. 913] rates of pay or other terms or conditions of employment of the employees of the plaintiffs in effect at their properties at the time of the promulgation by the President of the United States of said Executive Order will interfere with and destroy the right of the plaintiffs to bargain collectively with their employees and the bargaining position of the plaintiffs in connection therewith and thus irreparably damage the plaintiffs. In that regard, reference is hereby respectfully made, in the interest of brevity, to the statements with respect to the interference with, and destruction of, the right to bargain collectively, and the bargaining position in connection therewith, of United States Steel Company resulting from any such change, which statements are made in the above-mentioned affidavit of said John A. Stephens. The results of any such change with respect to the plaintiffs herein would be the same in substance as is alleged in those statements to be applicable with respect to United States Steel Company.

10. The plaintiffs will for each and all of the reasons stated above suffer irreparable injury with respect to which they will not have any adequate legal recourse. Among other things, in addition to the extreme difficulty, if not impossibility, of determining the extent of damages in money value as a result of changes in the rates of pay or other terms and conditions of employment of their employees in effect at their properties at the time of the promulgation by the President of the United States of said Executive Order, the changing of such rates of pay and other terms and conditions of employment would have a permanent effect, which once made could not be eliminated, upon the wage structure and other terms and conditions of employment applicable at such properties and the bargaining rights of the plaintiffs.

11. No previous application for a preliminary injunction [fols. 914-946] covering the relief sought herein has here-

tofore been made, although an application for a temporary restraining order was heard and denied by this Court on April 9, 1952.

Bruce Bromley.

Subscribed and sworn to before me this 23rd day of April, 1952. Louise Norris, Notary Public, D. C.
My Commission Expires Dec. 14, 1956. (Seal.)

[fol. 940] Defendants' opposition to Plaintiffs motion for preliminary injunction (omitted in printing).

[fol. 827] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

Civil Action No. 1581-'52

JONES & LAUGHLIN STEEL CORPORATION, a Pennsylvania Corporation with Principal Offices in Jones & Laughlin Building, Pittsburgh, Pennsylvania, Plaintiff

vs.

CHARLES SAWYER, Westchester Apartments, Washington, D. C., Defendant

ACTION FOR INJUNCTION, DECLARATORY JUDGMENT AND OTHER RELIEF

COMPLAINT—Filed April 9, 1952

For its complaint in this civil action the Plaintiff avers:

First: Plaintiff is a corporation duly organized and existing under the laws of Pennsylvania. Its principal offices are situate in the Jones & Laughlin Building, corner of 3rd Avenue and Ross Street, Pittsburgh, Pennsylvania.

Second: Defendant is a resident of the Westchester Apartments, in Washington, District of Columbia. He holds the office of Secretary of Commerce, of the United States.

Third: This is a civil action arising under the Constitution and the laws of the United States and between citizens of different States, in which the amount actually in

controversy, exclusive of interest and costs, is greatly in excess of the sum or value of Three Thousand Dollars.

Fourth: Plaintiff's principal business is that of manufacturing steel and a variety of steel products. In the pursuit of that business it now owns and operates, and it has for many years owned and operated, large basic steel works located at Pittsburgh and Aliquippa, Pennsylvania, and Cleveland, Ohio, and other, smaller manufacturing plants, warehouses, and other related facilities and prop[fol. 828] erties. The Plaintiff's properties aforesaid have an aggregate value of many millions of dollars.

Fifth: At all times since the end of the year 1951 the Plaintiff has been, and it still is, engaged in a controversy with the United Steelworkers of America, an unincorporated labor union (sometimes hereinafter referred to as the "Union") which has for years been legally qualified as the representative, among others, of the production and maintenance employees employed in Plaintiff's basic steel works and in many of Plaintiff's other manufacturing plants and related facilities and properties.

Sixth: Said controversy between Plaintiff and the Union has resulted principally from demands, made by the Union and not wholly agreed to by Plaintiff, that the wages of Plaintiff's said employees should be greatly increased as of January 1, 1952; demands made by the Union and rejected by the Plaintiff, that Plaintiff agree to establish and maintain a "Union Shop", and thereby to require that all of its eligible employees be members of the Union; and demands made by the Union and rejected by the Plaintiff, that Plaintiff agree to substantial restrictions upon its past rights to control and direct the work of its employees, and to control and direct the normal operations of its steel works and other operations.

Seventh: On or about March 20, 1952, the Wage Stabilization Board, having previously considered the matter as one certified to it by the President under Executive Order No. 10233, published certain written recommendations, formulated and joined in by certain of its members, by which said Board recommended that Plaintiff should agree with the Union to grant large wage increases as of January 1, 1952, to establish a "Union Shop" in all of its steel works and other properties aforesaid, and to accede

to some or all of the proposed restrictions of its past rights to control and direct the work of its employees and the conduct of its operations.

[fol. 829] *Eighth:* Said recommendations of the Wage Stabilization Board are by law advisory only, and can have no binding force. Nevertheless, the Union, to whose interests the recommendations are almost wholly favorable, has since insisted that Plaintiff must accept them without qualification; and the President of the United States has, in public statements made on and prior to April 8, 1952, declared the belief that Plaintiff and other steel manufacturers should accept them as a means of terminating its said controversy with the Union.

Ninth: Plaintiff has nevertheless refused and still refuses to accept said recommendations, except with certain important qualifications, because it cannot, with proper regard for its own future and for the interests of its stockholders, afford either to pay the large wage increases recommended by the Wage Stabilization Board or to surrender its rights of management as recommended by said Board; and because it cannot, with proper regard for its own convictions concerning principles of Government, agree to the recommendation of a "Union Shop".

Tenth: As a result of Plaintiff's aforesaid refusal to accept said recommendations of the Wage Stabilization Board, without qualification, the Union called a strike in all of Plaintiff's basic steel works aforesaid and many of Plaintiff's other manufacturing and related plants and facilities, as of 12:01 A.M. on April 9, 1952. As a result Plaintiff's basic steel works and said other manufacturing and related plants and facilities ceased their normal operations, largely or wholly, at or about that time.

Eleventh: On April 8, 1952 the President of the United States published Executive Order No. 10340, of which a copy is attached hereto marked "Exhibit A", and made a part hereof. By said Executive Order, the President directed the Defendant, as Secretary of Commerce, to take possession of the steel plants and other property of a number of steel manufacturing corporations, to operate and manage them at his discretion, to "determine and prescribe the terms and conditions of employment under which" such plants shall be operated; and to return pos-

session of them to their owners when (and only when) he shall judge it to be expedient in the national interest.

[fol. 830] *Twelfth:* On April 8, 1952, the Defendant accepted the powers and directions given him by said Executive Order and issued a written "Order No. 1" of which a copy is attached hereto, marked "Exhibit B" and made a part hereof, by which he assumed, and declared his intention to exercise, all of the powers purportedly conferred upon him by said Executive Order.

Thirteenth: On April 9, 1952, the Defendant signed and caused to be delivered to Plaintiff's President, a telegram of which a copy is attached hereto, marked "Exhibit C", and made a part hereof, by which Defendant declared his purpose forthwith to take possession, under said Executive Order, of all of Plaintiff's business offices, basic steel works and other manufacturing plants, and to operate and manage them in the manner contemplated by said Executive Order and by Defendant's "Order No. 1".

Fourteenth: Plaintiff is advised by its counsel and believes and therefore avers that Defendant has and can have no legal right or warrant, in all the premises, to seize or take possession of the Plaintiff's offices, steelworks and other properties aforesaid, or of any of the Plaintiff's property, and that the authority purportedly or pretend-ly conferred upon or vested in the Defendant by the aforesaid Executive Order is without validity under the law for the following reasons, to-wit:

1. That, at the time said Executive Order (Exhibit A hereto attached) was made, the President of the United States did not have and he does not now have, under the Constitution of the United States or any statute of the United States, any legal authority to seize or take possession of any property of the Plaintiff, in the manner contemplated by said Executive Order, or to cause or authorize any such property to be seized or taken into possession by the Defendant or any other individual as an officer or agent of the United States or otherwise;

2. That Defendant has no authority, either by virtue of the Executive Order aforesaid or by virtue of the Constitution or any statute or law of the United

States, to seize or take possession of any of the prop-
[fol. 831] erty of the Plaintiff, or to cause or authorize
any such seizure or taking into possession by any
other individual, as an officer or agent of the United
States or otherwise; and

3. That, as results, the seizure or attempted seizure
of the Plaintiff's property, intended by the aforesaid
Executive Order, is or would be an act of trespass for
which Defendant and his agent or agents have and
can have no legal warrant, which is or would be in vio-
lation of the rights of the Plaintiff to the continued
and peaceable possession and enjoyment of its prop-
erty and business, which would deprive the Plaintiff
of its property without due process of law in viola-
tion of the Fifth Amendment to the Constitution and
which would constitute an unreasonable seizure of
such property under the Fourth Amendment to the
Constitution.

Fifteenth: Nevertheless, Plaintiff is advised and fears
that, unless its rights to the continued and peaceable pos-
session and enjoyment of its property and business be pro-
tected by this Court, the Defendant or others acting in con-
cert with the Defendant and under his directions, will en-
force or attempt to enforce the seizure of the Plaintiff's
offices, steelworks and other manufacturing plants and
properties as aforesaid by force of arms, and will there-
upon exclude the Plaintiff's officers and employees from
their regular and customary management, control and
use of the offices and properties aforesaid and from the
regular and customary discharge of their duties as agents
and employees of Plaintiff, and will proceed to possess,
operate, control and manage Plaintiff's offices, steelworks,
plants and business aforesaid, against the will of the
Plaintiff.

Sixteenth: The said conduct of the Defendant, or others
acting in concert with the Defendant and under his direc-
tions, will result in immediate and irreparable injury, loss
and damage to the Plaintiff even before notice of this pro-
ceeding can be served and hearing had thereon, in that
Plaintiff will be unlawfully ousted of the possession and
control of its aforesaid property and deprived of the use

[fol. 832] thereof, and (as Plaintiff is advised and fears) in that the Defendant, or others operating in concert with the Defendant or under the Defendant's directions, will operate or attempt to operate Plaintiff's business in a manner which will result in serious and costly damage to its plants, equipment, contract rights and business, and which will prevent Plaintiff from pursuing its business in a manner necessary to secure the safe, efficient and economical conduct thereof.

Seventeenth: Plaintiff fears also that, unless he be forbidden from so doing by order of this Court, the Defendant will, pursuant to the authority purportedly conferred upon him by said Executive Order "to determine and prescribe terms and conditions of employment" (and in accordance with the declarations of the President of the United States described in paragraph Eighth of this Complaint) enter into a new contract or purported contract with the Union which will put into effect the aforesaid recommendations of the Wage Stabilization Board, and having done so will waste and destroy Plaintiff's steel works and other properties and resources in efforts to operate said steel works and Plaintiff's other manufacturing and related plants and properties under such a new contract, and will continue to withhold possession of said steel works and other properties and refuse to return them to the Plaintiff unless and until he shall be assured that Plaintiff's subsequent operations of such steel works and properties shall be conducted under or in accord with the terms of such new contract.

Eighteenth: Plaintiff has no adequate remedy at law.

Wherefore, Plaintiff respectfully prays that your honorable Court shall grant it relief by making Orders and Decrees as follows:

1. A Decree awarding a temporary restraining order and a Decree of Injunction, preliminary until final hearing and thenceforth perpetual, enjoining and forbidding the Defendant, or any other person acting in concert with or under the direction of the Defendant, from seizing or taking possession or making or continuing any effort to seize or take possession of the Plaintiff's business offices or of the Plaintiff's steel works and manufacturing properties, or of any other

[fol. 833] property of the Plaintiff, or in any other manner interfering with the continued and peaceable possession, control and enjoyment by the Plaintiff, or its officers, agents and employees, of any of the Plaintiff's properties, and of the Plaintiff's business.

2. A Declaratory Judgment, determining the nature and extent of plaintiff's rights to the continued possession of its business offices and records, and of its steel works and other properties, and the nature and extent of its obligations and those of its officers to it and to the Defendant, under all of the premises aforesaid.

3. Such other and further relief as the exigencies of the case may require, and as your honorable Court shall deem meet and just under the law.

Sturgis Warner, Jones, Day, Cockley & Reavis, 1135 Tower Building, Washington 5, D. C.; H. Parker Sharp, Jones & Laughlin Building, Pittsburgh, Pennsylvania; John C. Bane, Jr., Walter T. McGough, Reed, Smith, Shaw & McClay, 745 Union Trust Building, Pittsburgh, Pennsylvania.

[fol. 856]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted].

AFFIDAVIT OF WILLIAM R. ELLIOT IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER AND FOR PRELIMINARY INJUNCTION—Filed April 24, 1952

DISTRICT OF COLUMBIA, ss:

William R. Elliot, being duly sworn according to law, deposes and says:

1. I am Vice President in charge of Employee and Public Relations of the plaintiff Jones & Laughlin Steel Corporation.

2. Affiant makes this affidavit to support the application of plaintiff for a temporary restraining order and/or preliminary injunction against the defendant.

3. The defendant, having seized and now holding the steel plants and properties of the plaintiff against its will, has in effect threatened, declared, announced and asserted that in the immediate future he will order and direct an increase in the wage rates of the employees of plaintiff's business.

4. Affiant believes (based on statements made by Ellis Arnall, Administrator, Office of Price Stabilization) that such wage increase will not be accompanied by authorization for a price increase for the products manufactured by the plaintiff, which price increase will reflect such increased wage rates, and that unless the defendant is restrained and [fol. 857] enjoined immediately, he will put such increased wage rates into effect and will compel plaintiff to pay the same out of its funds.

5. The wage rate increases involved in the foregoing will cost the plaintiff annually large sums of money believed to be in the millions of dollars and payment thereof by the plaintiff under the coercion and force of the defendant without an adequate corresponding price increase will dissipate a substantial portion of the assets of the plaintiff which cannot properly be absorbed under the present circumstances, nor can the cost thereof be justified according to sound business methods and considerations, and it will be impossible to recover from their employees said sums so paid.

6. Plaintiff and this affiant believe that such funds so disbursed and dissipated could not be recovered from the defendant himself because the sum is so great that he lacks sufficient wealth with which to pay a judgment therefor.

7. Prior to January 1, 1952, negotiations in the nature of collective bargaining were conducted between plaintiff on the one hand, and the United Steelworkers of America (C. I. O.), representing employees of plaintiff, on the other, regarding wages, hours and working conditions of said employees beginning January 1, 1952.

8. The negotiations referred to in Paragraph 7 related to the demands of the Union for increased wages and certain so-called "fringe" benefits, such as vacation and holiday pay, and for a union shop and for a number of other items, such, for example, as management rights, incentives, local

working conditions, Saturday and Sunday premium pay, seniority and duration of contract.

9. The parties have been unable to reach an agreement regarding the matters referred to in Paragraph 8.

10. Any increase in wages ordered by the defendant would satisfy all or a portion of the aforesaid demand of the said Union but will impair and destroy the lawful, proper [fols 858-868] and effective bargaining position of the plaintiff with said Union, in that the plaintiff's employees will have secured an increase in wages without at the same time abandoning or modifying any of their demands, and without disturbing or impairing the Union's bargaining position for greater increases, for a union shop, and for the other items aforesaid.

11. The damage which plaintiff is about to suffer and sustain in connection with the foregoing is not capable of being compensated for in money and is otherwise irreparable; in addition to the foregoing, and based upon previous conduct of the Government in relation to the coal industry, affiant believes that defendant will require plaintiff, as a condition for the return of its seized properties, to adopt, accept and subscribe to such wage increases and/or working conditions, and affiant adds that, whether or not such condition is imposed, it will be impossible as a practical matter to return to the wage rates which existed prior to such increases.

12. By reason of the foregoing, immediate and irreparable injury, loss and damage will result to the plaintiff for which it has no adequate remedy except by temporary restraining order immediately issued.

William R. Elliot.

Subscribed and sworn to before me this 23rd day of April, 1952. Kathleen M. Ryan, Notary Public, D. C. My Commission Expires June 15, 1956.
(Seal.)

[fol. 868a] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR PRELIMINARY INJUNCTION

Now comes the plaintiff Jones & Laughlin Steel Corporation and respectfully moves the Court, upon the grounds set forth in its Complaint in this case, for an order granting a preliminary injunction enjoining and forbidding the defendant Charles Sawyer or any other person acting in concert with or under the direction of the defendant, until the final hearing of this action and until the further order of this Court, from seizing or taking possession, or making or continuing any effort to seize or take possession, of the plaintiff's business offices or of the plaintiff's steelworks and manufacturing properties, or of any other property of the plaintiff, or in any other manner interfering with the continued and peaceable possession, control, and enjoyment by the plaintiff, its officers, agents and employees, of any of the plaintiff's properties and of the plaintiff's business.

(S.) Sturgis Warner, Jones, Day, Cockley & Reavis,
1135 Tower Building, Washington 5, D. C.
H. Parker Sharp, Jones & Laughlin Building, Pittsburgh, Pennsylvania. John C. Bane, Jr., Walter
T. McGough, Reed, Smith, Shaw & McClay, 747
Union Trust Building, Pittsburgh, Pennsylvania.

[fol. 859] Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction (omitted in printing).

[fol. 950] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

Civil No. 1700-52

ARMCO STEEL CORPORATION, 703 Curtis Street, Middletown,
Ohio and Sheffield Steel Corporation, Sheffield Station,
Kansas City, Missouri, Plaintiffs,

against

CHARLES SAWYER, Individually and as Secretary of Com-
merce of the United States of America, Defendant

COMPLAINT FOR DECLARATORY JUDGMENT, PERMANENT IN-
JUNCTION AND OTHER RELIEF—Filed April 17, 1952

Armco Steel Corporation and Sheffield Steel Corpora-
tion, by their attorneys, Breed, Abbott & Morgan, for their
complaint herein allege:

1. This is an action for a declaratory judgment, for a per-
manent injunction and for other relief pursuant, among
other things, to the provisions of the Act of June 25, 1948, c.
646, 62 Stat. 944, 964, as amended by the Act of May 24,
1949, c. 139, Secs. 90, 111, 63 Stat. 102, 105 (28 U. S. C. A.,
Secs. 1651, 2201 and 2202).

2. Plaintiffs are corporations organized and existing
under and by virtue of the laws of the State of Ohio.

They are engaged in the production and sale in interstate
commerce of steel products and own and operate steel pro-
ducing plants in several of the States of the United States,
employing many thousands of persons in such operation
and having an investment of many million dollars in such
[fol. 951] plants and steel producing facilities. The great
majority of plaintiffs' customers have pending orders with
plaintiffs for steel products usable and to be used in the
civilian economy of the United States having no relation to
the defense effort of the United States.

3. The defendant, Charles Sawyer, is Secretary of Com-
merce of the United States, and is a resident of the District
of Columbia.

4. This action involves questions arising under the Con-
stitution and laws of the United States. The matter in

controversy exceeds, exclusive of interest and costs, the sum of \$3,000. There exists between the parties herein an actual justiciable controversy in respect of which plaintiffs require declaration of their rights by this Court.

5. On April 9, 1952, plaintiffs received from defendant a telegram and on April 11, 1952, an order designated Order No. 1 and dated April 8, 1952, by which telegram and order defendant purported to seize and take, and seized and took possession unlawfully of all real and personal properties of plaintiffs, except railroads and coal and metal mines. The telegram and order, which are annexed hereto as Exhibits A and B, respectively, purport to have been issued by defendant pursuant to authority vested in defendant by Executive Order No. 10340 issued by the President of the United States on April 8, 1952. Such Executive Order is annexed hereto as Exhibit C.

6. Prior to April 9, 1952, plaintiffs had enjoyed peaceful possession and the exclusive operation of such properties, all of which are owned by them, and had operated the same in all respects consistent with applicable laws of the United [fol. 952] States and of the various states of the United States having jurisdiction thereof.

7. The steel plants operated by plaintiff Armco Steel Corporation are the Middletown, Ohio, Plant; the Ashland Kentucky, Plant; the Butler, Pennsylvania, Plant; the Zanesville, Ohio, Plant; the Hamilton Plant, New Miami, Ohio; the Piqua Plant, Piqua, Ohio, and the Rustless Plant at Baltimore, Maryland. The steel plants operated by plaintiff Sheffield Steel Corporation are the Kansas City, Missouri, Plant; the Houston, Texas, Plant; and the Sand Springs, Oklahoma, Plant.

8. At all of the steel plants operated by plaintiff Sheffield Steel Corporation and at the steel plants operated by plaintiff Armco Steel Corporation at Ashland, Kentucky, and at Baltimore, Maryland, the United Steelworkers of America (hereinafter called the Union) represents certain employees for collective bargaining purposes.

9. On April 10, 1952, plaintiff Armco Steel Corporation received from defendant a telegram modifying his said Order No. 1 and his said telegram dated April 9, 1952, to exclude from plants, facilities and other properties of plain-

tiff Armeo Steel Corporation, possession of which had been taken by defendant as aforesaid, all plants, facilities and properties other than those at Ashland, Kentucky and Baltimore, Maryland.

10. Since on or about November 27, 1951, plaintiffs have been engaged in good faith in collective bargaining negotiations with the Union concerning wages and other conditions of employment. On December 22, 1951, the President of the United States referred the matter to the Wage [fol. 953] Stabilization Board for consideration and recommendation. Plaintiffs did not agree to be bound by or to accept any recommendations by the Wage Stabilization Board. On December 31, 1951, the labor agreements which had theretofore been in effect between plaintiffs and the Union at the plants at which the Union represents certain employees expired. On March 20, 1952, the Wage Stabilization Board made certain recommendations with respect to the employment conditions under negotiation. Plaintiffs have not accepted the recommendations of the Wage Stabilization Board. A strike of the employees of plaintiffs at such plants and of the employees of most other producers of steel products was called by the Union for 12:01 a.m., April 9, 1952.

11. On April 8, 1952, the President of the United States issued said Executive Order No. 10340 purporting to authorize and direct defendant to take possession of all or such of the plants, facilities and other property, or any part thereof, of listed companies, including plaintiffs, as he may deem necessary in the interest of national defense; and to operate or to arrange for the operation thereof and to do all things necessary for, or incidental to, such operation. The Executive Order recites the fact that a strike had been called, states that the Executive Order is issued to assure the continued availability of steel and steel products, and directs defendant, among other things, to determine and prescribe terms and conditions of employment under which the plants, facilities, and other properties, possession of which is taken pursuant to that Order, shall be operated.

[fol. 954] 12. Defendant's Order No. 1, as modified by defendant's telegram received on April 10, 1952, provides, among other things, that plaintiffs' plants, facilities and

other real and personal properties seized and retained by defendant are to be operated in accordance with such regulations and orders as are promulgated by defendant and recites that the management, officers and employees of plaintiffs' plants are serving the Government of the United States.

13. The Labor Management Relations Act of 1947 (29 U.S.C.A. App. § 141) provides specific, adequate and appropriate machinery for dealing with threatened or actual strikes which affect an entire industry or a substantial part thereof and which in the opinion of the President imperil the national health or safety. In the course of its deliberations on this Act, Congress considered and specifically rejected the device of seizure as a means of dealing with such a strike. The President has not invoked the provisions of this Act in connection with the labor dispute between plaintiffs and the Union, and has publicly disclaimed any purpose to invoke it or any part of it.

14. Plaintiffs have received no orders for materials placed pursuant to the provisions of the Universal Military Training and Service Act (50 U.S.C.A. App., Sec. 468); and the President has made no determination pursuant to the Defense Production Act (50 U.S.C.A. App., Sec. 2081) with respect to any property of plaintiffs nor has he taken any action to acquire any such property in accordance therewith. [fol. 955] 15. Executive Order No. 10340 and the actions of defendant taken or to be taken in pursuance thereof are unlawful, void and without effect in that:

(a) They are without authority or support under any statute of the United States, and specifically are outside of, inconsistent with and violative of the authority and procedures provided under the Labor Management Relations Act of 1947, the Universal Military Training and Service Act, and the Defense Production Act of 1950, as amended.

(b) They are without authority under any provision of, and violative of, the Constitution of the United States and specifically are beyond, and violative of, the powers and duties conferred upon the President by Article II of the Constitution. They constitute a usurpation of naked power by the President and the

defendant, and a usurpation by them of the powers placed by the Constitution exclusively in the Congress of the United States.

(c) They are unconstitutional in that they deprive the plaintiffs of liberty, occupation and property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

(d) They are unconstitutional in that they constitute an unlawful and tortious taking and withholding from the plaintiffs of their private property, and an unlawful use thereof, without just compensation in violation of the Fifth Amendment to the Constitution of the United States.

[fol. 956] (e) They are unconstitutional in that they constitute an unreasonable and wrongful seizure of the property, papers and effects of plaintiffs and a denial and disparagement of the rights of plaintiffs in violation of the Fourth and Ninth Amendments to the Constitution of the United States.

(f) They are unconstitutional in that they violate and invade the powers vested exclusively in the Congress under Section 1 and under Section 8, of Article I, and Section 3, of Article IV, of the Constitution of the United States.

(g) They are unconstitutional in that they violate and invade the rights reserved to the States or to the people under the Tenth Amendment to the Constitution of the United States.

16. Defendant's unlawful seizure of, and wrongful and continuing trespass upon, plaintiff's properties have been effected tortiously and without the consent of plaintiffs and over their protests and constitute a cloud on plaintiff's properties and their titles thereto. Plaintiffs are without any means, save by this suit, to protect and to assert their rights in their properties.

17. The actions of defendant taken or to be taken pursuant to Executive Order No. 10340 substantially and irreparably injure plaintiffs and will continue to do so, in the respects, among others, hereinafter set forth. For such

injuries plaintiffs have no adequate and effective remedy at law.

(a) Said unlawful seizure and wrongful continuing trespass by defendant unlawfully deprive plaintiffs of [fol. 957] their right to bargain collectively with their employees. Under defendant's Order No. 1 plaintiffs' managements are directed to act, in their relations with their employees, in accordance with the instructions of defendant. This unlawful interference with, and denial of, plaintiffs' rights freely to bargain collectively, imposed at a critical stage of plaintiffs' negotiations with the Union, does and will unlawfully and irreparably alter, to plaintiffs' injury, the status of the bargaining between plaintiffs and the Union, particularly in connection with the current labor dispute.

(b) In view of the provision of Executive Order No. 10340 that defendant shall determine and prescribe terms and conditions of employment in plaintiffs' plants, the necessary effect of the seizure if permitted to continue is to enable defendant unlawfully to concede, and, unless restrained by this Court, defendant may concede, to the Union and place in effect the recommendations of the Wage Stabilization Board, including an increased wage scale, the union shop, and other concessions to the Union. Plaintiffs are subject to illegal coercion by defendant as to the future conditions of employment of their employees. That plaintiffs are presently threatened with the imminent danger of such concessions being made is shown by the fact that defendant has already announced that he intends to proceed promptly to consider terms and conditions of employment as directed by said Executive Order No. 10340.

[fol. 958] (c) The placing into effect of and the coerced compliance by plaintiffs with the recommendations of the Wage Stabilization Board would result in greatly increased cost of production of plaintiff's products, and would constitute an act equivalent to an act of waste upon defendant's part and an unlawful dissipation and diversion of plaintiffs' funds. These products are subject to price regulations imposed by the

United States and the governmental agency regulating such prices has failed and refuses to permit increases in the prices of such products so as to enable plaintiffs to attempt to recoup such increased costs.

(d) Said unlawful seizure and continuing trespass by the defendant will result in the disruption of normal customer relationships between the plaintiffs and their customers, the great majority of whom have pending orders with the plaintiffs for steel and steel products usable and to be used in the civilian economy of the United States having no relation to any war effort of the United States, and such unlawful seizure and wrongful continuing trespass constitute a cloud on the titles to plaintiffs' properties.

(e) Said unlawful seizure and continuing trespass will give to the defendant access to confidential information and trade secrets in the files of the plaintiffs with regard to the business of the plaintiffs and their many customers in the United States.

(f) Said unlawful seizure and continuing trespass will threaten plaintiffs and their directors, officers, [fol. 959] agents and employees with criminal penalties in relation to any action taken by them to resist said unlawful seizure.

(g) Said unlawful seizure has resulted and will continue to result in the usurpation and impairment of the rights of the stockholders of plaintiffs, of whom there are many thousands, and the destruction of their rights to the management of the properties of plaintiffs by their duly elected and selected directors, officers, and agents, depriving them of the opportunity of realization of profitable operations through agencies of their own choosing, and reducing the realizable value of their holdings.

(h) Under the terms of defendant's Order No. 1 transferring plants, facilities and businesses from plaintiffs to defendant for an indefinite period of time plaintiffs are deprived of their right freely to operate their properties, to program their future business, to expand their facilities, and to protect their investments. Even though the present management personnel of plaintiffs remain in their respec-

tive positions and even though defendant does not immediately issue any order designed to alter plaintiffs' normal course of business, plaintiffs' managements and directors cannot fully and freely exercise managerial judgment since they cannot know how long defendant's control will continue, when or in what respects defendant will veto or otherwise affect a given management decision, what are and will be their legal rights and obligations under contracts entered into prior to defendant's seizure, or what will be the legal [fol. 960] consequences of any contracts entered into during the period of defendant's seizure of plaintiffs' properties. They know only that they are now directed to serve defendant, purportedly in the name of the United States.

(i) The goodwill of the nationwide business of plaintiffs in going concerns which have been built up during many years with tremendous and continuous effort and at enormous expense is threatened with adverse and permanent impairment by defendant's seizure of their properties.

(j) Plaintiffs' loss of freedom of collective bargaining, of maintenance of normal relationships in their businesses, of the benefit of private management and initiative in the control of their large and complicated properties, the injury to their goodwill and other elements of damage specified herein cannot possibly be adequately measured in monetary terms or be remedied in an action at law. Plaintiffs necessarily face the prospect of being forced to resort to successive, numerous, burdensome and protracted actions at law to recover for such measurable damage to them as may occur from time to time during the indefinite period of, and because of, defendant's illegal seizure of plaintiffs' properties. It is plaintiffs' information and belief that defendant would not be financially able to pay judgments, which might run into many hundreds of thousands of dollars, growing out of action taken with respect to the large and complicated properties of plaintiffs. Plaintiffs have no assurance that they will, or can, recover full and adequate compensation, if

[fol. 961] any, from the United States by any action or proceeding at law or otherwise for damage to their properties and businesses arising from defendant's unlawful action herein set forth.

Therefore the injunctive, declaratory and other relief prayed for herein is the only means available to plaintiffs for the protection of their rights.

Wherefore, for the reasons and on the grounds above set forth, it is prayed that:

A. Defendant be declared by the judgment of this Court to have no right to seize, possess, hold, operate or retain plaintiffs' properties under the purported authority of Executive Order No. 10340, or to require compliance by plaintiffs with defendant's Order No. 1 or other orders of a supplementary or similar nature; that this Court decree that such Executive Order and such other Order or orders of defendant are wrongful, invalid and void as without authority under any law of the United States and contrary to, and violative of, the Constitution of the United States and the rights of plaintiffs thereunder and otherwise; that such seizure, possession, holding, operating and retention of plaintiffs' properties are unlawful; and that the defendant be directed forthwith and unconditionally to return said properties to plaintiffs.

B. Defendant and all persons acting as his agents or under his direction or authority be temporarily enjoined, pending a final determination of this cause, from taking any action whatsoever under the purported authority of Executive Order No. 10340 or otherwise which in any way would affect, impair, or restrict plaintiffs' ownership, [fol. 962] rights, possession, control and management of any of their properties, or their contractual relations with others, or which would alter or affect the terms and conditions of employment or the relationships of plaintiffs with their employees in effect at the properties of plaintiffs at the time of the promulgation of said Executive Order.

C. Upon a final hearing, the aforesaid temporary injunction be made permanent.

D. Plaintiff be granted such other or further relief as may seem appropriate in the premises.

April 17, 1952.

Breed, Abbott & Morgan. By Joseph P. Tumulty, Jr., a Member of said Firm, Attorneys for Plaintiffs, 1317 F Street, N. W., Washington 4, D. C.

[fols. 963-1005] *Duly sworn to by Joseph P. Tumulty, Jr. Jurat omitted in printing.*

[fol. 1476a] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR PRELIMINARY INJUNCTION

Come now the plaintiffs, Armco Steel Corporation and Sheffield Steel Corporation, by their attorneys below named, and move the Court for a preliminary injunction, restraining and enjoining the defendant, Charles Sawyer, his agents, representatives, associates, subordinates, attorneys, privies, and all persons in active concert or participation with him or any of them, pending the final hearing and determination of this cause:

(a) From taking any action or continuing to take any action whatsoever to effectuate and carry out the provisions of Executive Order 10340 issued April 8, 1952, by the President of the United States insofar as said Executive Order is intended to apply to the plaintiffs herein, their officers, agents, and control and management of their properties.

(b) From molesting or interfering with plaintiffs or doing any act or thing which would prevent or tend to prevent the plaintiffs, their officers, agents and employees from operating the plaintiffs' said properties for their own account.

[fol. 1476b] (c) From in any respect changing the wages or other terms or conditions of employment in effect at the properties of the plaintiffs at the time of issuance of said Executive Order.

(d) From interfering in any other way with the plaintiffs' rights of ownership and control of their business and properties.

Breed, Abbott & Morgan, By (S.) Joseph P. Tumulty, Jr., 1317 F Street, N.W., Washington 4, D. C.

Charles H. Tuttle, Winfred K. Pétigrue, Stoddard B. Colby, Joseph P. Tumulty, Jr., of Counsel.

[fol. 999] Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction (omitted in printing).

[fol. 684] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

Civil Action No. 1647—'52

REPUBLIC STEEL CORPORATION, a New Jersey Corporation
With Principal Offices in Republic Building, Cleveland,
Ohio, Plaintiff,

VS.

CHARLES SAWYER, Secretary of Commerce, Department of
Commerce, Washington, D. C., Defendant

COMPLAINT

ACTION FOR INJUNCTION, DECLARATORY JUDGMENT AND OTHER
RELIEF Filed April 14, 1952

The plaintiff avers:

1. Republic Steel Corporation (hereafter called Republic) is a corporation duly organized and existing under the laws of the State of New Jersey with its principal office at Cleveland, Ohio, and it is principally engaged in the business of the production, manufacture and sale of steel and steel products, and owns, maintains and operates plants and facilities, including real estate, and other property used

in and appurtenant to its principal business in a number of States of the Union, including Ohio, New York, Connecticut, Illinois, California and Alabama in each of which it is qualified to do business.

2. The defendant, Charles Sawyer, is the duly appointed and acting Secretary of Commerce, and maintains his residence in the City of Washington, District of Columbia.

3. There is an actual controversy within the jurisdiction of this Court, and this case is a civil action wherein the matter in controversy exceeds the sum or value of Three Thousand [fol. 685] and Dollars (\$3,000.00), exclusive of interest and costs, and arises under the Constitution and laws of the United States by reason of the purported seizure by the defendant of certain facilities and properties of the plaintiff pursuant to the direction of the President of the United States.

4. Prior to seizure by the defendant of the plants and facilities of the plaintiff, as hereafter described, the plaintiff has had exclusive operation and possession of its properties and plants and has operated them in a manner consistent with the Constitution and laws of the United States, and of the States in which the plaintiff has been qualified to do business.

5. During the months of November and December, 1951, there were negotiations between the plaintiff and the United Steelworkers of America, C. I. O., a labor organization which had been certified by the National Labor Relations Board as the appropriate collective bargaining agent of the production and maintenance employees in certain of Republic's plants, concerning wages, hourly rates, and other conditions of employment, and leading up to a new contract to succeed a contract expiring December 31, 1951; on December 22, 1951, the President of the United States, deeming a controversy to have arisen, referred said controversy to the Wage Stabilization Board (an advisory agency constituted by Presidential Executive Order and reconstituted by an amending Executive Order No. 10233, issued April 21, 1951). Said Wage Stabilization Board, after consideration, issued a certain report and recommendations. The recommendations of the majority of said Board were that Republic enter into the agreement with the United Steelworkers of

America, C. I. O., extending to June 30, 1953, and containing provisions covering wages, hourly rates and other conditions of employment. The recommended increases in wages and hourly rates would, if incorporated in any such agreement, increase Republic's manufacturing costs by many millions of dollars.

6. Subsequent negotiations between Republic and said [fol. 686] United Steelworkers of America, C. I. O., having failed to result in agreement, Republic was notified in writing on April 4, 1952, by the President of the United Steelworkers of America, C. I. O., that a strike had been called at the plants of Republic, effective 12:01 A. M., April 9, 1952.

7. On April 8, 1952, the President of the United States issued an Executive Order No. —, by the terms of which he authorized and directed the defendant herein to take possession and control and to operate substantially all of the facilities and plants of Republic, thereby divesting Republic of possession and control of its own properties, and displacing the Board of Directors, and officers from their functions, duties, and responsibilities in the possession, control, and management of Republic's properties and assets.

8. Purporting to act pursuant to said Executive Order so issued by the President, the defendant notified Republic that the plants, facilities, assets, and other property of Republic used or useful to it in its business were seized and taken possession of by the defendant, pursuant to said Executive Order, without the acquiescence and over the protest of Republic.

9. There has been no exercise of the machinery and provisions afforded by the Labor Management Relations Act of 1947, commonly called the Taft-Hartley Act.

10. No orders for materials or supplies nor any requirements to make available percentages of its steel production have been tendered or given to Republic by the President of the United States or by any person acting under his authority pursuant to the provisions of the Selective Service Act of 1948, as amended and now entitled Universal Military Training and Selective Service Act (U. S. C. A. Title 50, Appendix, Sec. 468, 62 Statutes at Large 625), for any ma-

materials or supplies for use of the Armed Forces of the [fol. 687] United States or for use of the Atomic Energy Commission, and Republic has not rejected or refused, nor failed to fulfill, nor is it failing to fulfill, any and all orders placed with it required by the Controlled Materials Plan Regulations issued by the National Production Authority pursuant to power delegated to it by the Defense Production Act of 1950.

11. Plaintiff says that the purported seizures of Republic's plants, facilities, assets, and other property, as well as any further acts of seizure, possession and control, and whether by constructive or by physical and actual entry by this defendant, his agents and servants, are and will be without warrant in law, wrongful, illegal and unlawful, and has deprived and will deprive Republic of its property without due process of law, all in violation of the provisions of the Constitution of the United States, and especially the Fourth and Fifth Amendments thereof.

12. The action of the defendant, above described, has affected and will continue to affect adversely and irreparably, rights, property, and business of plaintiff in the following respects, among others:

(a) Seizure of Republic's properties by this defendant has deprived, and unless restrained by this Court, will continue to deprive Republic of its properties, of its control and right to control therein, has displaced and will displace its right of possession and its right of contract with respect to said properties, and its right to operate and control the properties in the ordinary course of its business.

(b) Its right to negotiate and bargain with its employees or their duly authorized representatives have been terminated and destroyed.

(c) Republic is imminently exposed to the possibility, created by the unlawful seizure made by this defendant, that a contract will be made with its employees by the defendant [fol. 688] himself or under the name of Republic with the said employees, incorporating any or all of the recommendations of said Wage Stabilization Board, or other terms, conditions, and rates of pay determined solely by the defendant, and independent of the exercise by the duly elected officers of Republic of their discretion and decision.

(d) The seizure has interfered with, impaired, endangered and will, unless terminated by this Court, destroy the relations and relationships which Republic over many years past, in the course of its extensive business, has established with many customers and purchasers, and will also interfere with current contracts, commitments, and quotations for contracts with said customers for products and materials for use in the civilian economy, and said seizure will expose Republic to loss of good will as well as civil liability for any impairment and interference with its contractual commitments.

(e) Said seizure has endangered and exposed to destruction trade secrets, secret methods, confidential information, and accounting information which Republic has acquired, developed, and used in the conduct of its business for many years all of which, if not maintained as such and if disclosed and revealed to the public and especially to Republic's competitors, would lose much or all of its value.

(f) Said seizure has resulted in the usurpation and impairment of the rights of the stockholders of Republic, of whom there are more than sixty thousand (60,000), and the destruction of their rights to the management of the properties of Republic by their duly elected and selected directors, officers, and agents, depriving them of the opportunity of realization of profitable operations through agencies of their own choosing, and reducing the realizable value of their holdings.

WHEREFORE, the plaintiff prays:

1. That this Court decree that the seizure of the plaintiff's property, as above described, is unlawful and illegal, [fol. 689] and unwarranted in law and, therefore, invalid and void from its outset.

2. That pending final hearing of this action this Court enter an order granting an interlocutory injunction restraining the defendant, his agents and employees, and all other persons acting under his control and authority, from interfering with, or doing any act or thing which would prevent or tend to prevent the plaintiff, its officers, agents, and employees from operating the plaintiff's properties for the account of Republic, and from in any respect changing the wages or other terms or conditions of employment now

in effect at the properties of the plaintiff, and from interfering in any other way with the plaintiff's contractual relations or with the plaintiff's right of ownership, operation, and possession of its business and property.

3. That upon final hearing this Court enter a decree permanently enjoining the defendant, his agents, employees, and other persons acting under his control and authority, from interfering with, or doing any act or thing which would prevent or tend to prevent the plaintiff, its officers, agents, and employees from operating the plaintiff's properties for the account of Republic, and from in any respect changing the wages or other terms or conditions of employment now in effect at the properties of the plaintiff, and from interfering in any other way with the plaintiff's contractual relations or with the plaintiff's right of ownership, operation, and possession of its business and property.

4. That the plaintiff have such other and further relief as to the Court may seem just and proper, including costs herein.

Hogan & Hartson, by Edmund T. Jones, Howard Boyd, 810 Colorado Building, Washington, D. C.; Gall, Lane and Howe, by John C. Gall, 401 Commonwealth Building, Washington, D. C.; Jones, [fols. 690-691] Day, Cockley and Reavis, by Luther Day, 1135 Tower Building, Washington, D. C.

Thomas F. Patton, General Counsel of Republic Steel Corporation.

[fol. 692]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

AFFIDAVIT—Filed April 24, 1952

DISTRICT OF COLUMBIA, ss:

Eugene Magee, being first duly sworn, on oath deposes and states:

That as Director of Industrial Relations of Republic Steel Corporation, plaintiff herein, and by virtue of such capacity, he has knowledge of the matters herein stated;

that he makes this affidavit in support of an application by plaintiff for a preliminary injunction against the defendant:

That on December 22, 1951, the President of the United States, in accordance with the terms of Executive Order 10,233, referred the labor dispute existing between certain steel companies, including plaintiff, and the United Steel Workers of America (CIO), to the Wage Stabilization Board for its report and recommendations; that on March 20, 1952, the Wage Stabilization Board submitted to the President its report on the matter, together with its recommendations for settlement, a copy of which report is set forth in full in Exhibit I to the Defendant's Opposition to Plaintiff's Motion for a Preliminary Injunction.

That since the seizure of plaintiff's plants and facilities on April 9, 1952, the defendant, his representatives and [fol. 693] agents, have publicly threatened and declared that in the immediate future defendant will increase the wages of plaintiff's employees represented by the United Steel Workers of America (CIO); that unless restrained by this Court, defendant through his agents will consummate the aforesaid threat and put into effect the said wage increase with the following consequences, among others, to plaintiff:

(a) As indicated in the aforesaid report and recommendations of the Wage Stabilization Board, wages are only one of approximately one hundred issues involved in the labor dispute. Plaintiff, as required by law, has been negotiating with the aforesaid Union not only in regard to wages but also respecting management rights, so-called local working conditions, seniority rights, incentive plans of compensation, a union shop and other important items of contract negotiation identified in the aforesaid report of the Wage Stabilization Board. The proper resolution of these matters is of immeasurable importance to plaintiff not only because of their immediate economic effect but primarily because of their relation to orderly and efficient operation of plaintiff's business. Your affiant, from his experience as Director of Industrial Relations for the plaintiff and in work of similar nature, believes and avers that it is not possible to reach a satisfactory over-all agreement in a labor dispute of the character here involved by attempting

to settle one issue at a time, because such issues are inseparably interrelated, and the same issues are of vastly different importance to the company and to the Union, respectively. Your affiant further believes and avers that the process of successful collective bargaining is dependent upon a settlement of all issues as a "package", and that this principle cannot be violated without serious, irreparable and incalculable prejudicial consequences to the plaintiff. By carrying out the aforesaid threat to immediately increase the compensation of plaintiffs' employees, without obtaining any corresponding concession from the aforesaid Union, defendant will permanently deprive plaintiff of the use of such increase as a means of obtaining favorable settlement of other vital issues in dispute, and thereby plaintiff's bargaining position will be permanently lost, proper resolution of such matters will be made extremely difficult, if not impossible, [fol. 694] and relations between plaintiff and said Union will deteriorate further rather than improve.

(b) Your affiant verily believes and therefore avers that plaintiff will be forced to continue to pay any increased rate of compensation which defendant is permitted to establish, even after plaintiff regains possession of its properties and will not be able to reestablish the wage scale altered by defendant without resulting turmoil, strife, deterioration of labor relations and probable strikes.

(c) That your affiant further avers that defendant's action in imposing such wage increases upon plaintiff deprives plaintiff of its legal right to bargain collectively with regard to such wages.

(d) That the prices of plaintiff's products are subject to Government control and regulation and no increase in the price of its products can be put into effect without prior approval of the Office of Price Stabilization. The Director of said Office of Price Stabilization has publicly announced that no price increase will be granted to plaintiff to compensate for the increase in wages now threatened, thus imposing great loss upon the plaintiff.

(e) Plaintiff in all of its integrated operations expends an average of not less than twenty man hours of labor to produce each ton of steel products. Thus, for every one cent increase in average employment costs, production

costs per ton of steel would increase by not less than twenty cents. Should the defendant put into effect the full wage increase and fringe benefits recommended by the Wage Stabilization Board the average cost of steel products shipped by the plaintiff would be increased by at least Six Dollars per ton for such employment costs alone. Other increases in costs of purchased products and services would result in a total increase in the average cost of steel products shipped by the plaintiff of at least Twelve Dollars per ton.

(f) That increased wages will subject plaintiff to immediate additional payroll expense in large amounts, the payment of which will result in permanent and irreparable loss to plaintiff.

[fol. 695] That, by reason of the foregoing, immediate, incalculable, irreparable injury, loss and damage will result to plaintiff for which it has no adequate remedy except through relief granted by this Court.

Eugene Magee.

Subscribed and sworn to before me this 23rd day of April, 1952. . . Carmel M. Motta, Notary Public.
(Seal.)

A copy of the foregoing affidavit was this 23rd day of April, 1952, personally served upon Attorneys for Defendant.

Hogan & Hartson, By Edmund T. Jones, Attorneys
for Plaintiff.

[fol. 696]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JOHN M. SCHLENDORF—Filed April 24, 1952

STATE OF OHIO,

County of Cuyahoga; ss: " "

John M. Schlendorf being first duly sworn says that he is vice president of the plaintiff company, Republic Steel Corporation (hereinafter called "Republic") and

1. That the President of the United States under date of April 8, 1952, issued an Executive Order by the terms of which generally he authorized the Defendant to seize, possess and operate the properties and facilities of various steel companies throughout the United States including those of the Plaintiff herein, Republic. A copy of said Executive Order is hereto attached and made a part hereof. In compliance with said Executive Order the Defendant has seized, taken possession of, and now operates said properties and facilities of the Plaintiff.

2. The Plaintiff, Republic organized and existing under the laws of the State of New Jersey with principal offices at Cleveland, Ohio, is principally engaged in the business of [fol. 697] the production, manufacture and sale of steel and steel products and owns and operates steel plants and facilities including real estate and other property used in and appurtenant to its principal business in the States of Ohio, New York, Connecticut, Illinois, California and Alabama; that among said properties, or all of them, are properties seizure of which is authorized by said Executive Order and contemplated by the Defendant pursuant to said order.

3. That no orders for materials or supplies, nor any requirements to make available percentages of the steel production have been tendered or given to Republic by the President of the United States or any person acting under his authority pursuant to the provisions of the Selective Service Act of 1948 (as amended and now entitled Universal Military Training and Selective Service Act USCA Title 50,

Appendix Sec. 468; 62 Stat. at Large 625) for any materials or supplies for use of the Armed Forces of the United States or for use of the Atomic Energy Commission and that Republic has not rejected or refused nor failed to fulfill, nor is it failing to fulfill, any and all orders placed with it required by the Controlled Materials Plan Regulations issued by the National Production Authority pursuant to power delegated to it by the Defense Production Act of 1950.

4. In and during the last two months of 1951 a controversy arose between Republic and the United Steelworkers of America, CIO, a labor organization which had been certified by the National Labor Relations Board as the appropriate collective bargaining agent of the production and maintenance employees of Republic in certain of its plants, concerning wages, hourly rates and other conditions of employment; that on December 22, 1951, the President of the United States referred such controversy to the Wage Stabilization Board, an agency constituted by Presidential Executive Order No. 10161 and reconstituted by Executive [fol. 698] Order No. 10233, issued April 21, 1951, and said Wage Stabilization Board, after consideration, issued certain reports and also certain recommendations of the majority of the Board to the effect that Republic enter into an agreement extending to June 30, 1953, with the United Steelworkers of America, CIO, containing provisions covering wages and other conditions of employment; among them a provision including increases in wage rates of 12½ cents per hour to July 1, 1952 but retroactive to January 1, 1952 and for the last half of the year 1952 an additional 2½ cents per hour and for the first 6 months of 1953 still an additional 2½ cents per hour; further — among them the inclusion of a union shop provision and other costly changes in conditions of employment and fringe benefits.

5. Although affiant is advised that the recommendations of the Wage Stabilization Board are purely advisory and have no binding effect upon it; yet if the recommendations of the Wage Stabilization Board were accepted as so recommended the production costs of Republic would be increased by many millions of dollars and such costs could not be recovered by Republic save by an increase in the

selling prices of its products over and beyond price increases which are now or may be authorized by the Office of Price Stabilization pursuant to the provisions of the Defense Production Act of 1950, USCA Title 50 Sec. 2101 et seq.

6. Seizure of Republic's properties by this Defendant has deprived and unless restrained by this Court will continue to deprive Republic of control and possession of its properties and has displaced and will continue to displace Republic in the operation of said properties in the ordinary course of its business and said seizure in addition to the deprivation of the aforesaid property rights has exposed and will continue to expose Republic to further incalculable and [fol. 699] irreparable damages in the following respects:

(a) Its right to negotiate and bargain with its own employees and their duly authorized bargaining representative has been seized and terminated.

(b) Republic by such seizure is exposed to the imminent possibility that a contract will be made by the Defendant himself or in the name of Republic with certain of its employees incorporating any or all of the recommendations of said Wage Stabilization Board or other rates of pay and conditions of employment determined solely by the Defendant and independent of the exercise by the duly elected officers of Republic of their discretion and decision.

(c) The relations and relationships which Republic over many years past and in the course of its extensive business has established with many purchasers and customers throughout the United States and its current contracts, commitments and quotations for contracts with its customers for products for use in the civilian economy have been interfered with, impaired and endangered and Republic has been threatened with loss of good will as well as civil liability for such impairment and interference with its contractual commitments.

(d) Certain trade secrets, secret methods, confidential information and accounting information which Republic has acquired, developed and used in the conduct of its business for many years may be inter-

ferred with and disclosed and revealed to the public and especially to Republic's competitors thereby destroying substantially all of the value thereof and

(e) The rights of the stockholders of Republic, of whom there are more than 60,000, including the right to [fols. 700-700a] management of the properties by their duly elected and selected directors, officers and agents and the right to the realization of profits from the operations through agencies of their own choosing have been usurped, endangered and impaired and the realizable value of their holdings has been reduced.

John M. Schlendorf.

Subscribed in my presence and sworn to before me this 14th day of April, 1952. William B. Belden, Notary Public, Cuyahoga County, Ohio. My commission expires January 3, 1954.

[fol. 725]

[File endorsement omitted]

UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR PRELIMINARY INJUNCTION

Comes now the plaintiff, Republic Steel Corporation, by its attorneys below named, and moves the Court for a preliminary injunction, restraining and enjoining the defendant, Charles Sawyer, his agents, representatives, associates, subordinates, attorneys, privies, and all persons in active concert or participation with him or any of them, pending the final hearing and determination of this cause:

(a) From taking any steps or continuing to take any steps whatsoever to effectuate and carry out the provisions of the Executive Order issued April 8, 1952, by the President of the United States insofar as said Executive Order is intended to apply to the plaintiff herein, its officers, agents, and the control and management of its properties.

(b) From molesting or interfering with plaintiff or doing any act or thing which would prevent or tend to prevent

the plaintiff, its officers, agents and employees from operating the plaintiff's said properties for its own account.

(c) From in any respect changing the wages or other terms or conditions of employment in effect at the proper [fol. 726] ties of the plaintiff at the time of issuance of said Executive Order.

(d) From interfering in any other way with the plaintiff's rights of ownership and control of its business and properties.

Hogan & Hartson, by Edmund L. Jones, Howard Boyd. Gall, Lane and Howe, by John C. Gall.
• Jones, Day, Cockley and Reavis, by Luther Day.

Thomas F. Patton, General Counsel of Republic Steel Corporation.

[fol. 701] Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction (omitted in printing).

[fol. 1011] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

Civil Action No. 1732-'52

E. J. LAVINO AND COMPANY, a Delaware Corporation, 1528 Walnut Street, Philadelphia 2, Pennsylvania, Plaintiff,

against

CHARLES SAWYER, Individually and as Secretary of Commerce of the United States of America, Washington, District of Columbia

COMPLAINT

(Action for Declaratory Judgment and Injunction Relief) —

Filed April 18, 1952

1. Plaintiff is a corporation duly organized and existing under the laws of the State of Delaware, with its principal executive office at 1528 Walnut Street, Philadelphia, Pennsylvania. It is principally engaged in the business of the

manufacture and sale of basic refractories and ferro manganese.

2. The defendant, Charles Sawyer, is Secretary of Commerce of the United States of America and is a resident of the District of Columbia.

3. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

4. There is an actual existing controversy within the jurisdiction of this Court between the parties in respect of which the plaintiff needs a declaration of its rights by this Court.

5. This action is brought pursuant to the provisions of 28 U.S.C. Sections 2201 and 2202, and Sections 11-301, 11-305 and 11-306 of the District of Columbia Code (1940 Edition).

[fol. 1012] 6. This action arises under the Constitution and laws of the United States by reason of the purported seizure by the defendant of certain plants and property of the plaintiff purportedly pursuant to the direction of the President of the United States as hereinafter set forth.

7. (a) Prior to the purported seizure by the defendant of said plants and property, hereinafter described, the plaintiff had exclusive possession of all its plants and property and was in exclusive control of the operation thereof and operated them in accordance with the Constitution and laws of the United States and of the States in which the plaintiff has been qualified to do business.

(b) At all the times hereinafter set forth the plaintiff's plants and property included the following: a plant at Plymouth Meeting, Pennsylvania, at which the plaintiff manufactured and now manufactures basic refractories; a plant at Sheridan, Pennsylvania, at which the plaintiff manufactured and now manufactures ferro manganese; and a plant at Lynchburg, Virginia, at which the plaintiff manufactured and now manufactures ferro manganese. The products of all of said plants are standard products and are not made to meet the specifications of particular customers. A large part of the products of said plants is sold to customers who are not steel producers.

(c) Said plants comprise tracts of land on which are located manufacturing works, fixtures, machinery, equipment, incidental facilities and other property.

(d) At none of the times hereinafter set forth did the plaintiff produce, manufacture or fabricate, nor does it now produce, manufacture or fabricate, steel or steel products. [fol. 1013] 8. The plaintiff has not received from the President of the United States, from the Atomic Energy Commission, or from any Government Agency, any order for materials placed pursuant to the provisions of Title I, Section 18 of the Universal Military Training Act of 1948 (62 Stat. 625; 50 U.S.C. App. 468):

9. On April 8, 1952, the President of the United States issued Executive Order 10340 "Directing the Secretary of Commerce to take possession of and operate the plants and facilities of certain steel companies". There was attached to, and made a part of, said Executive Order a list of companies. A copy of said Executive Order, and attached list, is hereto attached, marked "Exhibit A". Said list, among other things, contained the following text:

"E. J. Lavino and Company, 1528 Walnut Street, Philadelphia, Pennsylvania."

10. On April 8, 1952, the defendant, Charles Sawyer, purporting to act pursuant to the terms of said Executive Order 10340, issued Order No. 1, a copy whereof was received by the plaintiff on April 10, 1952, by the terms whereof the defendant purported to take possession of the plants, facilities and other properties of the companies named in a list attached to said Order No. 1, effective at twelve o'clock midnight, Eastern Standard Time, April 8, 1952, and to designate the President of each company named in said last-mentioned list Operating Manager for the United States for his respective company until further notice. A copy of said Order No. 1, with the accompanying list, is hereto attached and marked "Exhibit B". Said last-mentioned list, among other things, contained the following text:

"Mr. E. M. Lavino, President, E. J. Lavino & Company, 1528 Walnut Street, Philadelphia, Pa."

[fol. 1014] 11. Said copy of Order No. 1 of the defendant was accompanied by a paper entitled, "Notice of Taking of Possession by United States of America (Insert Name of Company)" dated April 8, 1952, and with the typewritten text, "Charles Sawyer Secretary of Commerce" at the end thereof. A copy of said Notice of Taking Possession is hereto attached, marked "Exhibit C".

12. On April 10, 1952, the plaintiff received a confirmation copy of a telegram from the defendant addressed to "President — — — Steel Company", contained in an envelope addressed to "Mr. E. M. Lavino, President, E. J. Lavino & Company, 1528 Walnut Street, Philadelphia, Pa." Said telegram was not dated but appears to have been transmitted to Western Union April 9, 1952. In said telegram, the original whereof was never received by the plaintiff, or by any one on its behalf, the defendant, among other things, requested each president to acknowledge by return wire his receipt of his appointment as Operating Manager on behalf of the United States of the properties of the Company. A copy of said confirmation copy received by plaintiff as aforesaid is hereto attached and marked "Exhibit D".

13. On April 10, 1952, Edwin M. Lavino, President of the plaintiff, sent a letter to the defendant acknowledging receipt of his appointment as Operating Manager on behalf of the United States of the plaintiff's plants at Plymouth Meeting and Sheridan, Pennsylvania, and Lynchburg, Virginia, a copy of which letter, marked "Exhibit E", is hereto attached and made a part hereof. Among other things, said last-mentioned letter stated that said three plants were the only plants of plaintiff where the collective bargaining agent was the United Steelworkers of America, C.I.O., and further stated that the plaintiff's compliance was without prejudice to its right as they might be ultimately determined judicially.

[fol. 1015] 14. On April 12, 1952, the defendant sent Edwin M. Lavino, President of the plaintiff a telegram stating that his Order No. 1 and his telegram of April 9, 1952, referred to in Paragraph 12 of this Complaint, were modified to exclude plants, facilities and properties other than the Plymouth Meeting plant and Sheridan plant in Pennsylvania and the Lynchburg plant in Virginia. A copy of

said last-mentioned telegram, marked "Exhibit F" is hereto attached and made a part hereof.

15. Executive Order 10340 by its terms was based upon a controversy which had arisen between certain companies in the United States producing and fabricating steel and certain of their workers represented by the United Steelworkers of America, C.I.O., regarding terms and conditions of employment, and upon the further circumstance that said controversy had not been settled through the processes of collective bargaining or through the efforts of the Government, including those of the Wage Stabilization Board to which the controversy was referred on December 22, 1951, pursuant to Executive Order No. 10233.

16. The plaintiff was not a party to the controversy which was referred by the President of the United States to the Wage Stabilization Board on December 22, 1951.

17. For the purposes of collective bargaining negotiations under the National Labor Relations Act the plaintiff has never in the past participated, and is not now participating, in bargaining negotiations carried on by the representatives of the steel companies and the Steelworkers. As the plaintiff is not engaged in the production or fabrication of steel it has never had occasion to participate in the nationwide negotiations between the steel industry and the Steelworkers. The practice of the plaintiff and the Steelworkers has been to make separate collective bargaining [fol. 1016] ing agreements which expire after the terms of the collective bargaining agreements negotiated between the steel companies and the Steelworkers.

18. The present three collective bargaining agreements between the plaintiff and the Steelworkers,—each of which covers employees in one of the above mentioned plants of plaintiff,—all expire on January 31, 1952, which is thirty days after the expiration of the collective bargaining agreements between the steel companies and the Steelworkers. No collective bargaining negotiations have taken place between the plaintiff and any representatives of the Steelworkers regarding terms and conditions of employment under a new collective bargaining agreement.

19. It was not until March 21, 1952, that plaintiff was notified by Philip Murray, President of the United Steelworkers of America, C.I.O., by telegram, that the Steel-

workers were ready to "resume" negotiations with the plaintiff on the basis of the Wage Stabilization Board's recommendations made on March 20, 1952, and that the Chairman of the Steelworkers' Negotiating Committee would contact plaintiff's representative immediately to begin negotiations March 24, 1952. Neither the Chairman of the Steelworkers' Negotiating Committee, nor any other person acting on the Steelworkers' behalf, contacted any representative of the plaintiff, and no collective bargaining negotiations were pending between the plaintiff and the Steelworkers at the time of the issuance of Executive Order 10340 on April 8, 1952.

20. On April 4, 1952, William G. Mowery, President, Local #3216, posted at the Plymouth Meeting plant of the plaintiff a notice, the text of which follows. "Contract negotiations between E. J. Lavino and Company and Local [fol. 1017] Union #3216 will commence Tuesday or Wednesday of next week. In the event a strike takes place in the Basic Steel Industry on April 8th, employees of E. J. Lavino and Company will not be involved."

21. Three days later (on April 7, 1952) plaintiff received from Philip Murray, President of the Steelworkers, three identical letters, dated April 4, 1952, stating that a strike had been called at plaintiff's plants at Plymouth Meeting, Sheridan and Lynchburg, effective 12:01 A.M. April 9, 1952.

22. As hereinbefore set forth neither the Chairman of the Steelworkers' Negotiating Committee, nor anyone acting on behalf of the Steelworkers had ever contacted plaintiff with respect to the negotiations proposed by Philip Murray on March 21, 1952. Plaintiff has never refused to participate in such collective bargaining negotiations with the Steelworkers.

23. No agreement which may be reached between steel companies and the Steelworkers on the terms of a new collective bargaining agreement can be determinative of many important terms of collective bargaining agreements between the plaintiff and the Steelworkers.

24. The plant at Plymouth Meeting, Pennsylvania, which produces basic refractories, of necessity, has labor classifications and other methods of doing business which follow the practice of the refractories industry. These classifica-

tions and methods differ to such an extent from those prevailing in the steel producing industry that few of the wage rates and job classifications of steel producers apply to the plaintiff's refractories plant at Plymouth Meeting.

25. The plants at Sheridan, Pennsylvania, and Lynchburg, Virginia, which make ferro manganese, have classifications similar to some of the classifications used by steel [fol. 1018] producers, but this is true only of blast furnace operations. In so far as concerns the production of ferro manganese, these plants are in no way comparable as to hourly rates and job classifications with those which prevail in the plants which produce or fabricate steel.

26. The methods of doing business in each of the plaintiff's three plants at Sheridan, Plymouth Meeting and Lynchburg necessarily conform closely to conditions which prevail in plants of competitors who do not have collective bargaining agreements with the Steelworkers.

27. While the Government has contended that price relief is not immediately involved in the controversy between the steel companies and the Steelworkers, no fair and equitable agreement can be arrived at between the companies, whose plants have been seized by the defendant, and the Steelworkers without the Government affording relief to the companies with respect to prices. In the case of the plaintiff, an additional ground for price relief arises out of the fact that one of the critical elements in the production of ferro manganese is manganese ore, which is imported from foreign countries, which is not subject to price controls imposed by the laws of the United States. Likewise one of the critical elements in the production of basic refractories is chrome ore, which is also imported from foreign countries, and which is not subject to price controls imposed by the laws of the United States. Consequently in the event that the present controversy between the steel companies and the Steelworkers should be settled by a plan which involves price relief, such relief would not be applicable to plaintiff, which would need special price relief adapted to the conditions of its own business.

28. On April 14, 1952, Edwin M. Lavino, President of the plaintiff, sent the defendant a telegram requesting that the defendant terminate its purported possession of the plaintiff's plants, and that he simultaneously terminate

[fol. 1019] Edwin M. Lävino's appointment as Operating Manager on behalf of the United States. A copy of said telegram, marked Exhibit G, is hereto attached and made a part hereof. Said last mentioned telegram stated that the plaintiff's application for termination of possession was without prejudice to the plaintiff's legal rights and remedies, including its position that the seizure of its plants was unwarranted by law and was not effective. By the terms of said last mentioned telegram the defendant was requested to act on the plaintiff's application for termination of possession forthwith.

29. The plaintiff has received no answer to its telegram sent to the defendant on April 14, 1952, referred to in the next preceding paragraph hereof.

30. The Congress has provided in the Labor Management Relations Act of 1947 specific and adequate machinery for the adjustment of the proposed strike and has specifically rejected the device of seizure as a means of settling the same. The President of the United States did not use the methods of adjustment provided in the Labor Management Relations Act of 1947 in connection with the proposed strike by the Steelworkers against the steel companies.

31. Executive Order 10340, issued April 8, 1952, and the actions of the defendant purportedly taken or to be taken thereunder are without authority of any presently existing statute of, or any provisions of, the Constitution of the United States, and are invalid, unlawful and without effect.

32. Executive Order 10340, issued April 8, 1952, and the actions of the defendant purportedly taken or to be taken thereunder, violate the Fourth Amendment of the Constitution of the United States.

[fol. 1020] 33. Executive Order 10340, issued April 8, 1952 and the actions of the defendant purportedly taken or to be taken thereunder, violate the Fifth Amendment to the Constitution of the United States.

34. Executive Order 10340, issued April 8, 1952, and the actions of the defendant purportedly taken or to be taken thereunder, violate the Tenth Amendment to the Constitution of the United States.

35. Executive Order 10340, issued April 8, 1952, and the

actions of the defendant purportedly taken or to be taken thereunder, are invalid, unlawful and without effect as to the plaintiff by reasons of the facts hereinbefore set forth.

36. Executive Order 10340, issued April 8, 1952, and the actions of the defendant purportedly taken or to be taken thereunder, are as to the plaintiff, violations of the Fourth, Fifth and Tenth Amendments to the Constitution of the United States.

37. The defendant was not authorized by the Executive Order 10340, issued April 8, 1952, to take possession of any of the properties of the plaintiff by reason of the facts hereinbefore set forth.

38. The actions of the defendant taken or to be taken under Executive Order 10340, issued April 8, 1952, have affected, and will continue adversely and irreparably to affect, the business and property of the plaintiff in that

(a) The basic refractories and ferro manganese industries are highly competitive and the plaintiff has many trade secrets and methods of doing business which are confidential and which the plaintiff would not under any circumstances be willing to have revealed to its competitors. The agents of the defendant in control of the properties of the plaintiff [fol. 1021] will have access to such secrets and methods and there is grave danger that they may be revealed to the competitors of the plaintiff and to others who do not have any right to information regarding them.

(b) The plaintiff over the years has built up substantial relationships with its customers and during the current national defense effort has done its best to maintain such relationships in a way consistent with the requirements of the national defense effort. During any period of seizure by the defendant, the business of the plaintiff will be subject to the control of defendant and his agents who do not have any particular reason for protecting such relationships and there is grave danger that such relationships will be impaired to the irreparable detriment of the plaintiff.

(c) The operation of the business of the plaintiff is highly technical and requires the constant attendance of persons who are thoroughly experienced therein. During any period of defendant's control, the operation of the business will be subject to the orders of defendant and his agents, many of

whom, doubtless, will not have any experience whatsoever in the operation of basic refractories and ferro-manganese plants and related facilities. There is grave danger that the seized plants and other facilities of the plaintiff will be irreparably harmed by the orders of defendant and his agents.

(d) The defendant has stated publicly that he would proceed promptly to consider making wage increases to the employees of the plants seized by him. Such threatened [fol. 1022] unilateral wage increase would supersede the plaintiff's control over its labor relations and result in irreparable injury to it.

Wherefore, the plaintiff prays:

(a) That the defendant return to the plaintiff possession of its plants at Sheridan, Pennsylvania; Lynchburg, Virginia; and Plymouth Meeting, Pennsylvania; and that the defendant simultaneously terminate the appointment of Edwin M. Lavino, President of the plaintiff, as Operating Manager of said plants on behalf of the United States.

(b) That this Court decree that Executive Order 10340 is without authority under any law of the United States or under the Constitution of the United States and is, therefore, invalid and void;

(c) That this Court decree that all action taken by the defendant pursuant to said Executive Order is invalid, unlawful and without effect;

(d) That this Court, pending final hearing and determination of this action, issue a preliminary injunction enjoining the defendant, and his successor or successors in office, his assistants, employees, agents and other persons acting under his control and authority, (i) from taking any steps whatsoever to effectuate and carry out the provisions of Executive Order 10340 promulgated by the President of the United States in so far as said Executive Order is intended to apply to the plaintiff herein, its officers, agents and the management of its properties, (ii) from molesting or interfering with or doing any act or thing which would prevent or tend to prevent the plaintiff, its officers, agents and employees, from operating the plaintiff's properties for its own account, (iii) from in any respect changing the wages

or other terms or conditions of employment in effect at the [fol. 1023] properties of the plaintiff at the time of promulgation of said Executive Order, and (iv) from interfering in any other way with the plaintiff's contractual relations with others or with the plaintiff's rights of ownership of its businesses and properties and the operation thereof;

(e) That this Court, upon final hearing and determination of this action, enter a decree permanently enjoining the defendant, and his successor or successors in office, his assistants, employees, agents and other persons acting under his control and authority, (i) from taking any steps whatsoever to effectuate and carry out the provisions of Executive Order 10340 promulgated by the President of the United States in so far as said Executive Order is intended to apply to the plaintiff herein, its officers, agents and the managements of its properties, (ii) from molesting or interfering with or doing any act or thing which would prevent or tend to prevent the plaintiff, its officers, agents and employees, from operating the plaintiff's properties for its own account, (iii) from in any respect changing the wages or other terms or conditions of employment in effect at the properties of the plaintiff at the time of promulgation of said Executive Order, and (iv) from interfering in any other way with the plaintiff's contractual relations with others or with the plaintiff's rights of ownership of its businesses and properties and the operation thereof; and

(f) That the plaintiff have such other and further relief as to the Court may seem just and proper.

April 18, 1952.

James Craig Peacock, 817 Munsey Building, Washington 4, D. C. Randolph W. Childs, Room 1100, [fol. 1024] 1528 Walnut Street, Philadelphia 2, Pennsylvania. Edgar S. McKaig, Room 1100, 1528 Walnut Street, Philadelphia 2, Pennsylvania, Attorneys for Plaintiff.

Adams, Childs, McKaig and Lukens; Williams, Myers and Quiggle, Of Counsel.

[fols. 1025-1025a] *Duly sworn to by I. Andrew Leith. Jurat omitted in printing.*

[fol. 1025b] EXHIBITS A AND B TO COMPLAINT

(Omitted in printing)

[fols. 1025c-1025d] EXHIBIT C TO COMPLAINT

Notice of Taking of Possession by United States of America

(Insert Name of Company)

By an Executive Order dated April 8, 1952, "Directing The Secretary of Commerce to take possession of and operate the plants and facilities of certain steel companies," the President of the United States authorized and directed the Secretary of Commerce to take possession of all or such of the plants, facilities, and other properties of certain companies as he may deem necessary in the interests of national defense, including the above named company, and to operate or to arrange for the operation thereof and to do all things necessary for, or incidental to, such operation.

In accordance with said order possession is hereby taken of the plants, facilities and other properties of the above named company, to the extent stated in Order No. 1 of April 8, 1952, issued under said Executive Order.

Charles Sawyer, Secretary of Commerce.

April 8, 1952.

[fol. 1025e] EXHIBIT D TO COMPLAINT

(Omitted in printing)

[fol. 1026]

EXHIBIT E TO COMPLAINT

April 10, 1952.

Honorable Charles Sawyer,
Secretary of Commerce,
Department of Commerce,
Washington 25, D. C.

DEAR SIR:

Answering confirmation copy of your wire received today, original of which was not received, addressed to "President, — Steel Company," I acknowledge receipt of appointment as Operating Manager on behalf of the United States of E. J. Lavino and Company's Plymouth Meeting Plant, its Sheridan Plant both located in Pennsylvania and its Lynchburg Plant, located in Virginia, the only plants where the employees are members of the United Steel Workers of America, C. I. O. At these plants, no labor dispute exists and no contract negotiations are in progress, although the notice of a strike of the members of this labor organization was received from National headquarters of the Union. The flag is being flown and the notice posted pursuant to Order No. 1 of the Secretary of Commerce. E. J. Lavino and Company does not produce and fabricate steel but in the plants listed above does produce products which go into the production of certain types of steel. The Executive order of the President uses the word "elements" without defining what is meant thereby. Assuming but not admitting that this is intended to embrace the plants above mentioned, our compliance is without prejudice to our rights, as they may be ultimately determined judicially.

Respectfully, E. J. Lavino and Company, Edwin M.
Lavino, President.

EML/EMO.

[fol. 1027]

EXHIBIT F TO COMPLAINT

Telegram

P. WAO38 TONG GOVT NL PD—Washington DC 12

Edwin M. Lavino, President,

E. J. Lavino and Co., 1528 Walnut St., Phila.

Receipt is acknowledged of your letter of April 10, 1952. My order Number One of April 8, 1952 and telegram of April 9, 1952 are modified to exclude from plants facilities and other properties possession of which was taken thereby all plant facilities and properties other than the Plymouth Meeting Plant and Sheridan Plant in Pennsylvania and the Lynchburg Plant of Lynchburg, Virginia of The E. J. Lavino and Company.

Charles Sawyer, Secretary of Commerce.

10 1952 8 1952 9 1952

Order reads Msgs and Radios from ships after closed
... no orders on personal messages. Phone in Order.

J. E. O'Connor, Lincoln 7-7533.

W. J. Keogh, DA4-5018.

G. J. Raiser Jr., Ardmore 4326.

W. T. Devitt, Wayne 2582.

[fol. 1028]

EXHIBIT G TO COMPLAINT

Day Letter to be sent by Western Union.

April 14, 1952.

Honorable Charles Sawyer,
Secretary of Commerce of United States,
Washington, D. C.

E. J. Lavino and Company, referred to below as "Lavino", hereby requests that you return to Lavino possession of its plants at Sheridan, Pennsylvania; Lynchburg, Virginia; and Plymouth Meeting, Pennsylvania.

Reference is made to the Executive Order of the President of the United States, your Order No. 1, Notice of Tak-

ing of Possession by the United States of America, and copy (received April 10, 1952) of telegram addressed to "President — Steel Company" contained in an envelope addressed to me as President of E. J. Lavino and Company appointing me operating manager for the United States of the properties of Lavino. In your telegram dated April 12, 1952, mailed by Western Union at Philadelphia April 13, and received by me today, you state that all properties of Lavino are excluded from the operation of the seizure order except Lavino's Plymouth Meeting Plant and Sheridan Plant in Pennsylvania and its Lynchburg Plant in Virginia.

This application is made pursuant to the President's Executive Order and your Order No. 1-above referred to.

The Executive Order of the President above referred to was by its terms based upon a controversy which had arisen between certain companies in the United States producing and fabricating steel and certain of their workers represented by the United Steelworkers of America, C. I. O., referred to below as "Steelworkers" regarding terms and conditions of employment and upon the further circumstance that said controversy had not been settled through the processes of collective bargaining or through the efforts of the Government including those of the Wage Stabilization Board to which the controversy was referred on December 22, 1951 pursuant to Executive Order No. 10233.

[fol.1029] Lavino was not a party to the controversy referred to in the Executive Order of April 8, 1952 and no controversy to which Lavino was a party was referred to any agency of the Government, including the Wage Stabilization Board. Specifically, no controversy existed between Lavino and the Steelworkers which was referred by the President of the United States to the Wage Stabilization Board on December 22, 1951. Lavino is not and has not been engaged in the production or fabrication of steel. Its plants at Sheridan, Pennsylvania and Lynchburg, Virginia, manufacture ferro manganese and its plant at Plymouth Meeting, Pennsylvania, manufactures basic refractories.

For the purposes of collective bargaining negotiations under the National Labor Relations Act, Lavino has never in the past participated, and is not now participating, in

collective bargaining negotiations carried on by representatives of the Steel Companies and the Steelworkers.

The practice of Lavino and the Steelworkers has been to make collective bargaining agreements which expire after the term of the collective bargaining agreements negotiated by the Steel Companies with the Steelworkers. Moreover the practice has been for collective bargaining negotiations between Lavino and Steelworkers to be postponed until after the pattern of new collective bargaining agreements has been set as a result of collective bargaining negotiations between the Steel Companies and the Steelworkers.

The present three collective bargaining agreements between Lavino and the Steelworkers all expire on January 31, 1952, which is 30 days after the expiration of the contracts between the Steel Companies and the Steelworkers. No collective bargaining negotiations have taken place between Lavino and any representatives of the Steelworkers regarding terms and conditions of employment under a new collective bargaining agreement. As stated above, the usual course would be that such collective bargaining negotiations would be undertaken after the Steel [fol. 1030] Companies and the Steelworkers had arrived at the basic terms of a new collective bargaining agreement.

On April 4, 1952, Philip Murray, President of United Steelworkers of America wrote Lavino letters stating that a strike has been called at its Sheridan, Lynchburg, and Plymouth Meeting Plants, effective 12:01 A.M., April 9, 1952. However, no controversy regarding terms and conditions of employment then existed between Lavino and the Steelworkers and no collective bargaining negotiations had been undertaken. As stated above, Lavino has never been a party to negotiations between the Steel Companies and the Steelworkers regarding terms and conditions of employment and Lavino was not a party to the controversy which was referred to the Wage Stabilization Board by the President of the United States on December 22, 1951.

Any agreement which may be reached by the Steel Company and the Steelworkers on terms of a new collective bargaining agreement cannot be determinative of many important terms of collective bargaining agreements Lavino and the Steelworkers.

The plant at Plymouth Meeting, which produces basic refractories, of necessity, has labor classifications and other methods of doing business which follow the practice of the refractories industry. These classifications and methods differ to such an extent from those prevailing in the steel producing industry that few of the wage rates and job classifications of steel producers apply to Lavino's refractories plant.

The plants at Sheridan, Pennsylvania, and Lynchburg, Virginia, which make ferro manganese, have classifications similar to some of the classifications used by steel producers, but this is true only of blast furnace operations. In so far as concerns the production of ferro manganese, these plants are in no way comparable as to hourly rates and job classifications with those which prevail in the plants which produce or fabricate steel.

The methods of doing business in each of Lavino's three [fol. 1031] plants necessarily conform closely to conditions which prevail in plants of competitors who do not have collective bargaining agreements with the Steelworkers.

While we realize that the Government contends that price relief is not immediately involved in the controversy between the Steel Companies and the Steelworkers, we submit that no fair and equitable agreement can be arrived at between the companies whose plants have been seized and the Steelworkers without the Government affording price relief to the companies with respect to prices. In the case of Lavino, an additional ground for price relief arises out of the fact that some of the critical elements in the production of ferro manganese is manganese which is imported from foreign countries which are not subject to price controls imposed by the laws of the United States. Consequently, in the event that the present controversy between the Steel Companies and the Steelworkers should be settled by a plan which involves price relief, such relief would not be applicable to Lavino which would need special price relief adapted to the conditions of its own business.

Under all the facts, I request that you not only terminate your possession of all of Lavino's plants but that you simultaneously terminate my appointment as Operating Manager on behalf of the United States.

This telegram of necessity has been prepared in haste.

and Lavino reserves its right to amplify its statement of the grounds on which your possession of its plants should be terminated.

This application is made without prejudice to Lavino's legal rights and remedies, including its position that the seizure of its plants was unwarranted by law and was ineffective. You are respectfully requested to act on this application forthwith as Lavino desires to promptly protect its rights by appropriate action.

Edwin M. Lavino, President E. J. Lavino and Company:

[fol. 1032] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR PRELIMINARY INJUNCTION—Filed April 18, 1952

Comes now the plaintiff, by its undersigned attorneys, and moves the Court, upon the basis of the verified complaint and affidavit of Andrew Leith filed herein, for a preliminary injunction on notice to the defendant, because it clearly appears from specific facts shown by said complaint and affidavit that immediate and irreparable injury, loss and damage will result to plaintiff from the unlawful acts of the defendant before a final hearing on the complaint.

The acts complained of, against which a restraining order is desired, are set forth in the verified complaint.

James Craig Peacock, 817 Munsey Building, Washington 4, D. C.; Randolph W. Childs, Room 1100, 1528 Walnut Street, Philadelphia 2, Penna.; Edgar S. McKaig, Room 1100, 1528 Walnut Street, Philadelphia 2, Penna., Attorneys for Plaintiff.

[fol. 1033] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION—Filed April 18, 1952

The purpose of this action is (a) to obtain a declaration by this Court that the President's Executive Order 10340 is invalid or, if not held invalid in toto, then that as to this plaintiff it is both invalid and inapplicable, and that in any event all action taken by the defendant with respect to this plaintiff and pursuant to said Executive Order is correspondingly invalid, and (b) to obtain a permanent injunction forbidding the defendant from taking or continuing as to plaintiff any action under the provisions of said Executive Order. In addition, plaintiff asks that, pending final determination, this Court forthwith issue a preliminary injunction in order to prevent frustration of the relief ultimately sought.

Only the questions of law discussed in Points I and II are at all common to any of the questions in Civil Actions Nos. 1539-52, 1549-52, and 1550-52. Plaintiff is not engaged in either producing or fabricating steel, and the matters presented in Points III and IV are wholly peculiar to the present case.

Points

I. *If justified on the merits, the relief sought may properly be granted against the defendant Secretary of Commerce.*

This is not a suit against the United States. *Larson v. D. & F. Corp.*, 337 U.S. 682, 689-690, citing *Philadelphia Co. v. Stimson*, 223 U.S. 605, 620, where it was squarely held that

“in case of an injury threatened by his illegal action, the officer [there the Secretary of War] cannot claim immunity from injunction process.”

and that exemption of the United States from suit does not protect its officers from liability “to persons whose rights of property they have wrongfully invaded.”

Neither is this action barred by the President's presumable immunity to suit. Congress admittedly enjoys the same degree of immunity. It is familiar law, however, that an officer may be enjoined from proceeding under an invalid Act of Congress. *Philadelphia Co. v. Stimson*, supra, *Santa Fee Pacific Co. v. Lane*, 244 U.S. 492. By the same token an invalid Order of the President can confer upon such an officer no greater protection.

Nor can it be contended that the present suit must fail because the President although unavailable is nevertheless an indispensable party. A superior officer is an indispensable party only "if the decree granting the relief sought will require him [here the President] to take action," and not "if the decree which is entered will effectively grant the relief desired by expending itself upon the subordinate official who is before the court [here the Secretary of Commerce]," *Williams v. Fanning*, 332 U.S. 490, 493, 494, *Hynes v. Grimes*, 337 U.S. 86, 89. The case at bar is therefore not even indirectly a suit against the President.

II. *Executive Order 10340 is ultra vires and therefore invalid.*

The seizure of plaintiff's plants was without authority under any existing statute or any provision of Constitution of the United States, and was in violation of plaintiff's rights under the Constitution.

Executive Order 10340, asserts that it is issued by virtue of the authority vested in the President by the Constitution and laws of the United States and Commander-in-Chief of the Armed Forces of the United States, but—

(a)

No Act of Congress gives the President the power to seize the plaintiff's plants.

Executive Order 10340, unlike the usual type of Executive Order,* recites no Act of Congress. None could be cited for none exist.

* Note. The very generality of the "Now, Therefore" clause is suspect in itself. Its failure to follow in a matter of such major importance the very general precedent in

Section 189 of the Selective Service Act of 1948 (50 U.S.C. App. Sec. 468) is inapplicable. Incidentally, the plaintiff's affidavit on this application for a preliminary [fol. 1035] injunction states that no order for materials of the type referred to in the Act has been placed with the plaintiff.

The President has not proceeded under Section 201 of Title II of the Defense Production Act of 1950, as amended (50 U.S.C. App. Sec. 2081). As to real estate, the President would have to institute condemnation proceedings.

(b)

Absent an Act of Congress, the President is without power to seize the plaintiff's plants.

Under the Constitution of the United States (Article II):

of The executive power is vested in the President (Section 1),

The President is the Commander-in-Chief of the Army and Navy (Section 2), and

The President "shall take care that the laws be faithfully enforced" (Section 3)

"Aside from these express powers, and those necessarily implied in them, *the President has no authority to act.*" (Italics supplied). Willoughby, Constitutional Law of the United States, Second Edition, Sec. 953, page 1473.

such Orders of citing the statute particularly relied upon is tantamount to an admission that neither the President nor his advisors could find any Act of Congress on which he could rely. For example, on August 29, 1950, when he seized the railroads, he was careful to cite in Executive Order 10155 the Act of August 29, 1916, 39 Stat. 619, 645. And on February 6, 1950, when he created a Board of Inquiry for the bituminous coal industry he was equally careful to cite in Executive Order 10106, Section 206 of the Labor Management Relations Act, 1947 (Public Law 101, 80th Congress). And so on.

As well stated in *Toledo, Peoria & Western R.R. v. Stover*, 60 F. Supp. 587, 593, S.D. Ill., 1945, (reversed on other grounds at 321, U.S. 50)—

“ . . . The executive department of our Government cannot exceed the powers granted to it by the Constitution, and if it does exercise a power not granted to it, or attempts to exercise a power in a manner not authorized by statutory enactment, such executive act is of no legal effect.”

To the same effect see 16 C.J.S. 509 (Const. Law § 167)²—

“In the United States, the executive power in the Federal branch is vested in the President. However, except as other powers are vested in him by Congress, the President has only such powers as are conferred upon him by the Constitution.”

Any contention that the Executive Order can be sustained on the ground that the United States was at war with Japan on April 8, 1952, is specious. The Senate on March 20, 1952, (98 Cong. Rec. 2635) gave its advice and consent to the ratification of the treaty of peace with Japan which was signed at San Francisco in September, 1951. Certainly it would be frivolous to argue that the seizure of the plaintiff's plants was justified as a means of prosecuting a war against Japan.

Nor can the seizure be supported on the theory that the United States is at war in Korea. The question as to whether a state of war exists is a political question which can be determined only by the Congress,—which is the [fol. 1036] only branch of the Government which has the power to make war. Congress has made no such determination.

This Court will realize that the fundamental issue in this case is whether the President of the United States has the power to take any action, including the seizure of private property, which he deems necessary for the welfare or defense of the United States. Voices of expediency insist;

in ever increasing number and volume, that the President needs, and therefore has, such power. They say, with Pope

"For forms of Government
Let fools contest,
That which is best
Administered is best."

In reality this school of thought would (1) convert the Federal Government from one of powers limited by the Constitution (including the Tenth Amendment) to one of unlimited sovereign powers, and (2) substitute a rule of men, and indeed of a single man, for a rule of law.

These arguments of expediency are "in direct conflict with the doctrine that this is a government of enumerated powers" and that the Tenth Amendment forbids "the National Government under the pressure of a supposed general welfare [to] attempt to exercise powers which had not been granted". (*Kansas v. Colorado*, 206 U.S. 46, 89, 90).

This is not the first occasion on which the forces of action-at-any-cost have asserted that the national government, or one of its branches, has unlimited power "in the light of * * * grave national crisis". As was said by Mr. Chief Justice Hughes, speaking for a unanimous court, in *Schechter Corp. v. United States*, 295 U.S. 495, 528, holding unconstitutional the National Industrial Recovery Act:

"Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment."

III. *Irrespective of its validity or invalidity with respect to the steel industry generally, Executive Order 10340 is [fol. 1037] not by its terms applicable to plaintiff, and if construed as so applicable it is invalid at least to that extent.*

Plaintiff itself neither produces nor fabricates steel. One of the seized plants manufactures basic refractories which are an item of furnace equipment rather than an element of steel or any other product. The other two manufacture ferro-manganese. At all three plants the entire production is standard and not designed to meet special needs of any particular industry or customers. A large part of the production of the plaintiff's plants—sold to purchasers who are not engaged in producing or fabricating steel.

Furthermore, plaintiff's principal competitors are not subject to collective bargaining with the Steelworkers. And its own plants have labor classifications which to only a limited extent are similar to those of the steel industry. It is only as to this limited group of classifications that wage rates agreed upon between the steel companies and the Steelworkers have any bearing upon plaintiff's collective bargaining negotiations with the Steelworkers. Even in this restricted area,—bargaining, with the acquiescence of the Steelworkers, has always been conducted separately from the negotiations of the Steelworkers with the steel industry. In fact, it was not until as recently as March 21, 1952, that the Steelworkers themselves advised plaintiff that they were ready to start current negotiations, and as recently as April 4, 1952, they posted a notice at one of the plaintiff's plants that such negotiations "will commence Tuesday or Wednesday of next week", i.e. April 8 or 9. Plaintiff thus was not in fact, and could not possibly have been, a party to the "controversy" which in Executive Order 10340, signed by the President on April 8, 1952, was referred to as already having a long drawn out history.

Executive Order 10340 is not applicable to plaintiff. That Order is expressly premised on the continuance of a thrice-mentioned "controversy" between "certain companies" and the representatives of their workers. Plaintiff is not one of "the said companies" so referred to and has never

been a party to that "controversy" or to the negotiations which have been unsuccessful. The inclusion of its name in the list attached to the Order makes the several parts of the composite whole inconsistent with each other. The preamble of the Order is, on the one hand, clear and unambiguous in its declaration of the scope, purpose and intent of the Order. Paragraph "1" of the directive provisions, on the other hand, is not mandatory upon defendant to seize [fol. 1038] all of the plants of all of the listees. (For example, in plaintiff's case he seized only three of its several plants.) It is therefore a fair and proper construction of the Order that it is limited, and intended to be limited, to plants with respect to which the owner "companies" are parties to the "controversies", and that in carrying out the Order the defendant is to be guided by its declaratory provisions.

The Order therefore does not apply to any of plaintiff's plants.

If, however, it is construed as applicable, then for the reasons already developed under Point II augmented by the factors set out in this Point, it is clearly invalid at least to the extent of such application to plaintiff.

IV. Granting of a preliminary injunction is justified to prevent irreparable injury to plaintiff.

For reasons more fully developed in paragraph 38 of the Complaint and paragraph 23 of the supporting affidavit of Andrew Leith, even the temporary continuance of the occupation of its plants by defendant would work irreparable injury to plaintiff.

Aside from any other fact, the defendant's public announcement that he is considering granting wage increases, —without the consent and against the protests of the owners of the seized plants,—constitutes a threat that the defendant will displace and supersede the owner's management of their labor relations. The resulting harm to the owners would be disastrous, far reaching and utterly beyond repair.

Respectfully, James Craig Peacock, Randolph W. Childs, Edgar S. McKaig, Attorneys for Plaintiff.

Adams, Childs, McKaig and Lukens, Williams, Myers & Quiggle, of Counsel.

Copy served April 18, 1952. Charles M. Ireland, U. S. Atty.

[fol. 1039]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT—Filed April 18, 1952

COMMONWEALTH OF PENNSYLVANIA,

County of Philadelphia, ss:

Andrew Leith, being duly sworn, deposes and says:

1. I am a Vice President of E. J. Lavino and Company, the plaintiff in this action, and am familiar with the facts involved in this action.

2. This affidavit is made in support of the application of the plaintiff for a preliminary injunction restraining and enjoining the defendant from taking any steps whatsoever to effectuate and carry out the provisions of Executive Order 10340 issued April 8, 1952, in so far as said Executive Order purports to apply to the plaintiff. The statements hereinafter set forth are true to the best of my knowledge, information and belief.

3. The plaintiff is engaged in the business of the manufacture and sale of basic refractories and ferro-manganese. The plants of the plaintiff which have been seized by the defendant are as follows: a plant at Plymouth Meeting, Pennsylvania, at which the plaintiff manufactures basic refractories; a plant at Sheridan, Pennsylvania, at which the plaintiff manufactures ferro manganese; and a plant at Lynchburg, Virginia, at which the plaintiff manufactures ferro manganese. The products of all of said plants are standard products and are not made to meet the specifications of particular customers. A large part of the products of said plants is sold to customers who are not

steel producers. Said three plants comprise tracts of land on which are located manufacturing works, fixtures, machinery, equipment, incidental facilities and other property.

4. None of the plaintiff's plants produce steel or steel products.

5. Said plants have been seized by the defendant purporting to act under the provisions of the Executive Order aforesaid, and plaintiff thereby has been deprived of the possession, control and use of said plants and properties to the detriment of the plaintiff.

6. I have caused an examination to be made of the relations between the plaintiff and the Government of the United States in respect of the obligation and duties of the plaintiff, whether arising by contract or otherwise, to furnish articles or materials to the Government. As a result of such examination I find that neither the President of the United States, nor any person acting under his authority, has placed under the provisions of Section 18 of the Selective Service Act of 1948, as amended, (62 Stat. 604, 625, 50 U.S.C. App. Sec. 468) any order for any articles or materials for the use of the Armed Forces of the United States or for the use of the Atomic Energy Commission.

[fol. 1041] 7. Said seizure is predicated solely upon the situation arising out of a controversy between certain companies in the United States producing and fabricating steel and certain of their workers represented by the United Steelworkers of America, C. I. O. (hereinafter called the "Steel workers") regarding terms and conditions of employment, and upon the further circumstance that said controversy had not been settled through the processes of collective bargaining or through the efforts of the Government, including those of the Wage Stabilization Board, to which the controversy was referred by the President of the United States on December 22, 1951, pursuant to Executive Order No. 10233.

8. The plaintiff was not a party to the controversy which was referred by the President of the United States to the Wage Stabilization Board on December 22, 1951.

9. For the purposes of collective bargaining negotiations under the National Labor Relations Act the plaintiff has never in the past participated, and is not now participating,

in bargaining negotiations carried on by the representatives of the steel companies and the Steelworkers. As the plaintiff is not engaged in the production or fabrication of steel it has never had occasion to participate in the nationwide negotiations between the steel industry and the Steelworkers. The practice of the plaintiff and the Steelworkers has been to make separate collective bargaining agreements which expire after the terms of the collective bargaining agreements negotiated between the steel companies and the Steelworkers.

10. The present three collective bargaining agreements between the plaintiff and the Steelworkers,—each of which covers employees in one of the above mentioned plants of plaintiff,—all expire on January 31, 1952, which is thirty days after the expiration of the collective bargaining agree-[fol. 1042] ments between the steel companies and the Steelworkers. No collective bargaining negotiations have taken place between the plaintiff and any representatives of the Steelworkers regarding terms and conditions of employment under a new collective bargaining agreement.

11. It was not until March 21, 1952, that plaintiff was notified by Philip Murray, President of the United Steelworkers of America, C. I. O., by telegram, that the Steelworkers were ready to "resume" negotiations with the plaintiff on the basis of the Wage Stabilization Board's recommendations made on March 20, 1952, and that the Chairman of the Steelworkers' Negotiating Committee would contact plaintiff's representative immediately to begin negotiations March 24, 1952. Neither the Chairman of the Steelworkers' Negotiating Committee, nor any other person acting on the Steelworkers' behalf, contacted any representative of the plaintiff, and no collective bargaining negotiations were pending between the plaintiff and the Steelworkers at the time of the issuance of Executive Order 10340 on April 8, 1952.

12. On April 4, 1952, William G. Mowery, President, Local #3216, posted at the Plymouth Meeting plant of the plaintiff a notice, the text of which follows. "Contract negotiations between E. J. Lavino and Company and Local Union #3216 will commence Tuesday or Wednesday of next week. In the event a strike takes place in the Basic Steel

Industry on April 8th, employees of E. J. Lavino and Company will not be involved."

13. Three days later (on April 7, 1952) plaintiff received from Philip Murray, President of the Steelworkers, three identical letters, dated April 4, 1952, stating that a strike had been called at plaintiff's plants at Plymouth Meeting, Sheridan and Lynchburg, effective 12:01 A. M. April 9, 1952.

[fol. 1043] 14. As hereinbefore set forth neither the Chairman of the Steelworkers' Negotiating Committee, nor anyone acting on behalf of the Steelworkers, had ever contacted plaintiff with respect to the negotiations proposed by Philip Murray on March 21, 1952. Plaintiff has never refused to participate in such collective bargaining negotiations with the Steelworkers.

15. No agreement which may be reached between steel companies and the Steelworkers on the terms of a new collective bargaining agreement can be determinative of many important terms of collective bargaining agreements between the plaintiff and the Steelworkers.

16. The plant at Plymouth Meeting, Pennsylvania, which produces basic refractories, of necessity, has labor classifications and other methods of doing business which follow the practice of the refractories industry. These classifications and methods differ to such an extent from those prevailing in the steel producing industry that few of the wage rates and job classifications of steel producers apply to the plaintiff's refractories plant at Plymouth Meeting.

17. The plants at Sheridan, Pennsylvania and Lynchburg, Virginia, which make ferro manganese, have classifications similar to some of the classifications used by steel producers, but this is true only of blast furnace operations. In so far as concerns the production of ferro manganese, these plants are in no way comparable as to hourly rates and job classifications with those which prevail in the plants which produce or fabricate steel.

18. The methods of doing business in each of the plaintiff's three plants at Sheridan, Plymouth Meeting and [fol. 1044] Lynchburg necessarily conform closely to conditions which prevail in plants of competitors who do not have collective bargaining agreements with the Steelworkers.

19. While the Government has contended that price relief is not immediately involved in the controversy between the steel companies and the Steelworkers, no fair and equitable agreement can be arrived at between the companies, whose plants have been seized by the defendant, and the Steelworkers without the Government affording relief to the companies with respect to prices. With respect to the plaintiff, an additional ground for price relief arises out of the fact that one of the critical elements in the production of ferro manganese is manganese ore which is imported from foreign countries, which is not subject to price controls imposed by the laws of the United States. Likewise, one of the critical elements in the production of basic refractories is chrome ore, which is also imported from foreign countries and which is not subject to price controls imposed by the laws of the United States. Consequently, in the event that the present controversy between the steel companies and the Steelworkers should be settled by a plan which involves price relief, such relief would not be applicable to plaintiff, which would need special price relief adapted to the conditions of its own business.

20. I am advised by counsel for the plaintiff that recommendations which were made by the Wage Stabilization Board on March 20, 1952, are not of any legal effect and cannot in any way be construed as binding upon the plaintiff. Said recommendations include a wage increase of 12½ cents effective for most of the steel companies January 1, 1952; 2½ cents additional effective June 30, 1952; 2½ cents more on January 1, 1953; various so-called "fringe" benefits and a union-shop provision. The defendant threatens to put such recommendations into effect, in whole or in part, and continue them in effect, in whole or in part, and thereby grant to the Steelworkers increases in wage rates and other benefits which the plaintiff and [fol. 1045] the Steelworkers have not agreed to as a result of collective bargaining negotiations. The plaintiff is thereby threatened with irreparable injury.

21. If said recommendations shall be put into or continued in effect, irreparable injury will result and continue to result even after the plaintiff's properties have been returned to it. This is clear, because as a practical matter it would be impossible for the plaintiff, upon the return of

its properties to it, to recede from any increased wage rates and other "fringe" benefits and to cancel any union-shop provisions which may be put into effect by the acceptance of said recommendations, and which may be applicable to the plaintiff. The plaintiff will be saddled with wage rates and employment conditions from which it will be unable to retreat and which it cannot afford to grant. Plaintiff will have imposed upon it the union-shop which is not traditional in the refractories industry or in the ferro manganese industry, which is highly controversial, which many employees resent as a violation of their personal liberty, and which should be established, if at all, only as the result of collective bargaining negotiations between employer and employees acting through their bargaining representative. Moreover, a union-shop is prohibited by a statute of the State of Virginia, where plaintiff's Lynchburg plant is located. (Sections 40-68 through 40-74 of the Code of Virginia of 1950). The irreparable injury referred to in this paragraph of the Affidavit will be directly attributed to the action of the defendant against which the plaintiff will not have any adequate legal recourse.

22. As heretofore stated, many of the job classifications in plaintiff's plants do not exist in the plants of the steel companies involved in the labor controversy, which is the subject of recommendations made by the Wage Stabilization Board on March 20, 1952. Plaintiff fears that wage increases and "fringe" benefits may be put into effect by the defendant without affording plaintiff an opportunity to be heard thereon and without collective bargaining negotiations between the plaintiff and the Steelworkers.

23. The seizure of the properties of the plaintiff will cause the plaintiff irreparable injury in many respects, of which the following are examples:

(a) The basic refractories and ferro manganese industries are highly competitive and the plaintiff has many trade secrets and methods of doing business which are confidential and which the plaintiff would not under any circumstances be willing to have revealed to its competitors. The agents of the defendant in control of the properties of the plaintiff will have access to such secrets and methods and there is grave danger that they may be revealed to the

competitors of the plaintiff and to others who do not have any right to information regarding them.

(b) The plaintiff over the years has built up substantial relationships with its customers and during the current national defense effort has done its best to maintain such relationships in a way consistent with the requirements of the national defense effort. During any period of seizure by the defendant, the business of the plaintiff will be subject to the control of defendant and his agents who do not have any particular reason for protecting such relationships and there is grave danger that such relationships will be impaired to the irreparable detriment of the plaintiff.

(c) The operation of the business of the plaintiff is highly technical and requires the constant attendance of persons who are thoroughly experienced therein. During any [fol. 1047] period of defendant's control, the operation of the business will be subject to the orders of defendant and his agents, many of whom, doubtless will not have any experience whatsoever in the operation of basic refractories and ferro manganese plants and related facilities. There is grave danger that the seized plants and other facilities of the plaintiff will be irreparably harmed by the orders of defendant and his agents.

(d) The defendant has stated publicly that he would proceed promptly to consider making wage increases to the employees of the plants seized by him. Such threatened unilateral wage increases would supersede the plaintiff's control over its labor relations and result in irreparable injury to it.

Andrew Leith.

Subscribed and sworn to before me this 18 day of April, 1952. Edwin S. Freiling, Notary Public.
My Commission Expires March 5, 1953. (Seal.)

Copy served April 18, 1952. Charles M. Ireland, U. S. Atty. J. L.

[fol. 1048] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

AFFIDAVIT OF CHARLES SAWYER—Filed April 24, 1952

CITY OF WASHINGTON,
District of Columbia, ss:

I, Charles Sawyer, first being duly sworn, do hereby depose and say:

1. I am Secretary of Commerce and was Secretary of Commerce on April 8, 1952, the date of issuance of Executive Order 10340 (17 F. R. 3139).

2. That a controversy between the United Steel Workers of America, CIO, and E. J. Lavino & Company was referred to the Wage Stabilization Board by the President on December 29, 1951, under the terms of his original referral of December 22, 1951.

3. That E. J. Lavino & Company was included among the companies listed by Executive Order 10340 which authorized taking possession thereof by me.

4. That on April 8, 1952, I issued Order No. 1 (17 F. R. 3242; 17 F. R. 3360) under said Executive Order taking possession of certain properties of E. J. Lavino & Company for the reason that I deemed such taking necessary.

[fols. 1049-1123] 5. That on April 12, 1952, I excluded from the operation of the aforesaid Order No. 1, "All plants, facilities, and properties other than the Plymouth Meeting Plant, and Sheridan Plant in Pennsylvania, and the Lynchburg Plant at Lynchburg, Virginia, of the E. J. Lavino & Co."

6. After consideration of statements received from E. J. Lavino & Company and from United Steel Workers of America, CIO, I have formed the judgment that at the Plymouth Meeting, Sheridan and Lynchburg plants strikes will take place in the event possession is returned to E. J. Lavino & Company. As the purpose of Executive Order 10340 is to protect the interests of national defense by providing uninterrupted flow of steel and steel products, I have,

therefore, refused to return possession of said plants to E. J. Lavino & Company at the present time.

Charles Sawyer.

Subscribed and sworn to before me this 23rd day of April, 1952. Thomas R. Stewart, Notary Public.
(Seal.)

[fol. 1050] Defendants Opposition to Plaintiffs' Motion for Preliminary Injunction (omitted in printing).

[fol. 1124] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF GEORGE B. GOLD—Filed April 25, 1952

COMMONWEALTH OF PENNSYLVANIA,

County of Philadelphia, ss:

George B. Gold, being duly sworn, deposes and says:

1. I am a Vice President of E. J. Lavino and Company, the plaintiff in this action, and am familiar with the facts involved in this action. For many years I have had charge of the collective bargaining negotiations on behalf of the plaintiff with labor organizations representing hourly workers in plaintiff's plants.

2. I have read the affidavit of Andrew Leith, a Vice President of the plaintiff, verified the 18th day of April, 1952, and desire to supplement the facts set forth in his affidavit with respect to the differences between the conditions in the industries involved in the plaintiff's plants, of which the defendant has purported possession, and in the plants of steel producers seized by the defendant.

3. As set forth in said affidavit of Andrew Leith, the plaintiff is not engaged in the production or fabrication of steel (Par. 16). The products of all of the plaintiff's plants [fol. 1125] are standard products and are not made to meet

the specifications of certain customers. A large part of the products of said plants is sold to customers who are not steel producers (Par. 3). For example, in the case of basic refractories, the product is sold, not only to steel producers, but to producers of power, cement, paper, nickel and copper.

4. Hereto attached, marked Exhibit A and made a part hereof, is a tabulation showing with respect to each of the plaintiff's plants at Plymouth Meeting, Pennsylvania, Sheridan, Pennsylvania and Lynchburg, Virginia: (a) job titles; (b) the wage rate for each job; and (c) the number of employees in each job.

5. To the best of deponent's knowledge the content of the jobs shown in Exhibit A is not the same as the content of jobs in the steel industry, except as to a limited number of jobs in the blast furnace operations of the plaintiff conducted at plaintiff's plants at Sheridan, Pennsylvania, and Lynchburg, Virginia, and as to the latter jobs; there are variations in job content.

6. Plaintiff's principal competitors in the production of basic refractories are General Refractories Company and Harbison Walker Refractories Company, and the hourly workers of said competitors' plants are not represented by the United Steelworkers of America.

7. Plaintiff's principal competitors in the production of ferro manganese, aside from two steel producers, are not engaged in the production or fabrication of steel and their hourly workers are not represented by the United Steelworkers of America.

8. No agreement which may be reached between the steel producers and the Steelworkers on the terms of a new collective bargaining agreement can be determinative of [fol. 1126] the terms of a new collective bargaining agreement between the plaintiff and the Steelworkers. In order to preserve the right of the plaintiff's and the Steelworkers to engage in collective bargaining, as provided in the National Labor Relations Act and in the Labor Management Relations Act of 1947, representatives of the plaintiff and the Steelworkers will necessarily have to consider proposals which will be advanced by the plaintiff and by the Steelworkers. The representatives of the plaintiff have

always been willing to engage in collective bargaining with the Steelworkers, and are now prepared to do so.

9. If the defendant directs the plaintiff to make any increases in wage rates in any of plaintiff's plants, the plaintiff will be put at a great disadvantage with respect to its competitors who do not have collective bargaining agreements with the Steelworkers and whose contracts with their labor organizations have not expired.

10. In Paragraph 19 of said affidavit of Andrew Leith reference is made to the necessity for price relief to compensate for any wage increases which may be put into effect in the plants of steel producers. Whether wage increases in the plants of the steel producers become effective by direction of the defendant or by a settlement agreement between the steel producers and the Steelworkers, involving an increase in the ceiling price of steel products,—such relief would be inapplicable to the plaintiff either with respect to basic refractories or ferro manganese. The inapplicability of any price relief granted to the steel producers arises out of the facts that (a) the products of that industry are dissimilar from the products of the plaintiff, (b) the increased costs of ingredients imported from foreign countries, not subject to price control, are a large [fol. 1127] factor in the prices of plaintiff's products, and (c) there is a wide difference in wage classifications of the steel producers and of the plaintiff.

George B. Gold.

Subscribed and sworn to before me this 23rd day of April, 1952. John T. Carroll, Notary Public. My Commission Expires March 7, 1953. Notary Public for the Commonwealth of Pennsylvania, residing in the City of Philadelphia. (N. S.)

Copy served by me at Mr. Taylor's office on April 23, 1952.
J. C. Peacock, Attorney for Plaintiffs.

[fol. 1128]

EXHIBIT A TO AFFIDAVIT
Sheridan, Pa. Plant—Payroll Ending 4/13/52
(Rates Effective: December 1, 1950)

Job. No.	Job Title	No. of Men on Job	Rate
1	Locomotive Engineer	2	\$1.54
2	Locomotive Fireman	1	1.35
3	Brakeman	2	1.41
4	Trestleman	2	1.35
5	Crane Operator (Yard)	3	1.54
6	Crane Fireman	3	1.35
7	Laborer	39	1.27
8	Skipman	4	1.37
9	Scalemans	4	1.37
10	Keeper	4	1.48
11	First Helper	4	1.41
12	Second Helper	4	1.36
13	Third Helper	4	1.34
14	Stove Tender	5	1.44
15	Pumpman	4	1.33
16	Blowing Engineer	5	1.49
17	Cinder Snapper	4	1.37
18	Cinder Engineer	3	1.49
19	Iron Carrier	10	1.35
20	Cast House Laborer (Mud Man)	2	1.31
21	Boiler Fireman	4	1.35
[fol. 1129]			
22	Water Tender	4	1.44
23	Cast House Crane Operator	4	1.41
24	Stock House Laborer (Coke Cleaner)	4	1.27
25	Carpenter	1	1.335
26	Welder's Helper		1.36
27	Welder Leader	1	1.64
28	Traxcavator Operator	1	1.35
29	Blacksmith	1	1.48
30	Blacksmith Helper	1	1.36
31	Store House Man	1	1.30
32	Time Clerk	1	1.33
33	Pipefitter	1	1.48
34	Water Softening Plant Operator	1	1.35
35	Mechanic "A" (Electrical)	1	1.48
36	Mechanic "B" (Boiler Cleaner & Washer)	1	1.36
37	Gas Man Leader	1	1.34
38	Track Gang Leader	1	1.37
39	Mechanic Helper	2	1.35
40	General Maintenance Man (Safety and Maintenance)	1	1.43
41	Watchman	4	1.30
42	Laboratory Helper	1	1.34
[fol. 1130]			
43	Boilermaker	1	1.52
44	Janitor	1	1.27
45	Truck Driver	2	1.35
47	Chauffeur	2	1.33
49	General Repairman "B"	1	1.41
50	Mechanic "B" (Diesel Shovel Operator)	1	1.48
51	Machinist "A" (Machinist Leader)	1	1.64
52	Tube Blower	2	1.30
53	Painter	1	1.36
55	Gas Men	3	1.30
	Laboratory Ass't. (Part Time)	1	1.44

[fol. 1131]

Lynchburg, Va. Plant—Payroll Ending 4/13/52

(Rates Effective: December 1, 1950)

Job. No.	Job Title	No. of Men on Job	Rate
1	Locomotive Engineer	1	\$1.46
2	Locomotive Fireman	2	1.28
3	Brakeman	1	1.35
4	Trestleman	1	1.28
5	Crane Operator	3	1.46
6	Crane Fireman	4	1.28
7	Laborer	19	1.175
8	Skipman	4	1.35
9	Larry Car Operator	4	1.35
10	Keeper	5	1.42
11	First Helper	4	1.35
12	Second Helper	4	1.29
13	Cast House Laborer	1	1.25
14	Stove Tender	4	1.37
15	Pumpman	4	1.28
16	Blowing Engineer	4	1.43
17	Cinder Snapper	4	1.25
18	Potman	4	1.30
19	Cinder Engineer	5	1.43
20	Iron Carrier	12	1.29
21	Mud Man	1	1.23

[fol. 1132]

22	Boiler Fireman	4	1.28
23	Boiler Fireman Helper	4	1.225
24	Boiler Cleaner	1	1.29
25	Boiler Cleaner Helper	1	1.225
26	Water Tender	4	1.37
27	Craneman (Cast House)	1	1.46
28	Carpenter	2	1.385
29	Carpenter Helper	0	1.275
30	Gas Man	1	1.29
31	Repairman Helper B	2	1.24
32	Watchman	4	1.22
33	Laboratory Helper	1	1.42
34	Janitor	1	1.175
35	Truck Driver	1	1.28
36	Machinist B	1	1.46
37	Repairman A	2	1.46
38	Shovel Operator	1	1.42
39	Boiler Maker	1	1.45
40	Sample Boy	1	1.25
41	Blacksmith	1	1.42
42	Blacksmith Helper	1	1.29
43	Repairman Helper A	1	1.35
44	Pipefitter	1	1.42

[fol. 1133]

45	Moulder (Part Time)	1	1.24
46	Bulldozer Operator	1	1.35
47	Oiler	4	1.36
48	Bricklayer (Part Time)	1	1.56
49	Painter	1	1.22
	Gas Man Helper	1	1.225

[fol. 1134]

Plymouth Meeting, Pa. Plant—Payroll Ending 4/13/52

(Rates Effective: December 1, 1950)

Job. No.	Department	Job Title	No. of Men on Job	Rate	
				Min.	Max.
	Ore Mill	Incentive Men	57	\$1.28	\$1.67
87	"	Warehouse Clerk	1		1.37
61	"	Maintenance 2nd Class	1		1.46
61	"	Maintenance 3rd Class	1		1.43
	"	Sub-Foreman	1		1.60
122	Technical	Chem. Lab. Helper 1st Cl.	3		1.49
122 A	"	Chem. Lab. Helper 2nd Cl.	1		1.37
118	"	Physical Lab. Sub-Foreman	1		1.63
120	"	Physical Lab. Assistant	8		1.40
121	"	Physical Lab. Helper	5		1.34
113	"	Physical Lab. Sampler	2		1.43
114	"	Screen Test Oper.	3		1.43
117	"	Welder	1		1.56
119	"	Furnace Oper. 1st Cl.	2		1.56
119 A	"	Furnace Oper. 2nd Cl.	1		1.40
124	"	Photographer 1st Cl.	1		1.40
126	"	Instrument Man	1		1.63
	"	Instrument Man 2nd Cl.	1		1.49
	"	Janitress (Part Time)	1		1.03
	"	Petrographic Lab. Tech.	1		1.43
114 A	Ore Mill	Tech. Samplers	8		1.34
			101		
[fol. 1135]					
89	Machine Shop	Mach. 1st Cl.	6		1.86
90	"	Mach. 2nd Cl.	2		1.56
91	"	Mach. Helper	1		1.34
92	"	Lay Out	2		1.75
93	"	Welder	2		1.63
94	"	Blacksmith	1		1.67
	"	Asst't. Foreman	1		1.86
127	Storeroom	Stores Ledger Clerk	1		1.46
128	"	Storeroom Clerk	4		1.46
131	"	Station Wagon Opr.	1		1.37
130	"	Office Janitor	1		1.28
	"	Weight Master	1		1.52
93	Construction	Welder	2		1.67
95	"	Millwright 1st Cl.	3		1.83
96	"	Millwright 2nd Cl.	5		1.49
99	"	Bricklayer	1		1.60
100	"	Carpenter 1st Cl.	2		1.71
97	"	Mechanics Hlpr.	7		1.37
104	"	Laborer	8		1.28
96 A	"	Painter 1st Cl.	1		1.52
[fol. 1136]					
103	"	Truck Driver	1		1.37
103 A	"	Truck Driver (Shipping)	1		1.46
105	Electrical	Electrician 1st Cl.	8		1.86
106	"	Electrician 2nd Cl.	2		1.52
107	"	Electrician 3rd Cl.	2		1.46
108	"	Electrician Helper	3		1.34
109	"	Elect. Truck Repairman	3		1.63

Departmental Total 72

Plymouth Meeting, Pa. Plant—Payroll Ending 4/13/52

(Rates Effective: December 1, 1950)

Job. No.	Department	Job Title	No. of Men on Job	Rate	
				Min.	Max.
	Brick Plant				
10	Grinding Unit	Unit Oper. 1 & 2	4		1.67
9	"	R. R. Mill Oper.	3		1.40
8	"	Screen Oper.	8		1.31
6	"	Crusher Oper.	2		1.31
7	"	Yard Man	2		1.28
5	"	Shovel Oper.	2		1.37
12	"	Unit Runner #3	0		1.46
11	"	Dryer Oper.	4		1.28
30	Brick Plant				
	General	Maint. Gen. 1st Cl.	4		1.36
[fol. 1137]					
31	General	Maint. Gen. 2nd Cl.	3		1.56
32	"	Maint. Gen. 3rd Cl.	3		1.43
35	"	Track Man	6		1.34
23	Press Room	Press Maint. 1st Cl.	3		1.63
25	"	Press Maint. Hlpr.	4		1.34
13	"	Larry Oper.	2		1.52
15	Press Room	Pan Helper	1		1.28
16	"	Hopper Tender	5		1.28
20	"	Press Helper	3		1.31
20 A	"	Car Handler	5		1.31
19	"	Off Bearer 2nd Cl.	6		1.37
17	"	Sub-Foreman or Inspector	7		1.71
27	"	Clean-up Man	6		1.37
21	"	Vibrator Press Oper.	5		1.37
22	"	Vibrator Press Helper	2		1.28
33 A	"	Greaser	3		1.31
29	"	Temper Tester	1		1.28
28	"	Laborer	21		1.28
27 A	"	Relief Man			
[fol. 1138-1142]					
45	Tunnel Kilns	Maintenance 1st Cl.	2		1.86
46	"	Maintenance 2nd Cl.	2		1.56
47	"	Maintenance 3rd Cl.	1		1.43
48	"	Maintenance Helper	3		1.34
41	"	Fireman 1st Cl.	4		1.90
42	"	Fireman 2nd Cl.	8		1.63
43	"	Fireman 3rd Cl.			
44	"	Fireman Helper	3		1.34
53	"	Car Repair 1st Cl.	4		1.37
54	"	Car Repair 2nd Cl.	1		1.31
49	"	Bricklayer 1st Cl.	1		1.63
50	"	Bricklayer 2nd Cl.	2		1.49
51	"	Bricklayer 3rd Cl.			
52	"	Bricklayer Helper	6		1.34
55	"	Brick Cutter	4		1.31
36	"	Clerk	4		1.37
37	"	Sub-Foreman	1		1.63
55 A	"	Janitor	4		1.28
	"	Head Janitor	2		1.31
	"	Incentive	70	2.32	2.64

Grand Total

410

[fol. 419]

Civil No. 1550-52

No. 11,410

THE YOUNGSTOWN SHEET AND TUBE COMPANY, a Body Corporate, Youngstown, Ohio; THE YOUNGSTOWN METAL PRODUCTS COMPANY, A Body Corporate, Youngstown, Ohio

v.

CHARLES SAWYER, The Westchester, 4000 Cathedral Avenue, N. W., Washington, D. C.

[fol. 419] Complaint for injunction and for a declaratory judgment (Omitted in printing).

[fol. 425a] Exhibit A. Executive Order (Omitted in printing).

[fol. 426] Summons and service (Omitted in printing).

[fol. 427] Affidavit of Walter E. Watson (Omitted in printing).

[fol. 431] IN THE UNITED STATES DISTRICT COURT

[Title Omitted]

MOTION FOR TEMPORARY RESTRAINING ORDER—Filed April 9, 1952

Come now the plaintiffs, by their undersigned attorneys and move the Court, upon the basis of the verified complaint and affidavit of Walter E. Watson filed herein, for a temporary restraining order without notice to the defendant, because it clearly appears from specific facts shown by said complaint and affidavit that immediate and irre-

parable injury, loss and damage will result to plaintiffs from the unlawful acts of the defendant before notice can be served and a hearing had thereon.

The acts complained of, against which a restraining order is desired, are set forth in the verified complaint.

John C. Gall, John J. Wilson, J. E. Bennett, Attorneys for Plaintiffs

[fol. 432] Motion for preliminary injunction (Omitted in printing).

[fol. 433] Memorandum in support of motion (Omitted in printing).

[fol. 434] Statement by Secretary of Commerce, Charles Sawyer following the President's Directive (Omitted in printing).

[fol. 434a] Telegram from Charles Sawyer (Omitted in printing).

[fol. 435] Telegram dated April 8, 1952 Charles Sawyer to Philip Murray (Omitted in printing).

[fol. 435a] Order No. 1 (Omitted in printing).

[fol. 436] Notice of taking of possession by United States of America (Omitted in printing).

[fol. 437] IN THE UNITED STATES DISTRICT COURT

[Title Omitted]

ORDER—Filed April 10, 1952

This cause came on to be heard on April 9, 1952, and the Court after hearing the arguments of counsel for the parties and being of the opinion that plaintiffs' application for a temporary restraining order should be denied, it is hereby

Ordered that plaintiffs' application for a temporary restraining order be, and the same hereby is, denied.

Alexander Holtzoff, United States District Judge.

Dated this, the 10th day of April, 1952.

(N)

[fol. 438] Opposition to motion for a preliminary injunction, attachments and affidavits in support (omitted in printing).

[fol. 263] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

Civil Action No. 1624-52

UNITED STATES STEEL COMPANY, 525 William Penn Place,
Pittsburgh, Pennsylvania, Plaintiff,

v.

CHARLES SAWYER, Department of Commerce, Washington,
D. C., Defendant

[fol. 263] Complaint for declaratory judgment and injunctive relief (Omitted in printing).

[fol. 274a] Exhibit A. Telegram from Charles Sawyer (Copy) (Omitted in printing).

14-744-745

[fol. 274b] Exhibit B. Order No. 1 (Copy) (Omitted in printing).

[fol. 274c] Exhibit C. Executive Order (Copy) (Omitted in printing).

[fol. 275] Motion for preliminary injunction (Omitted in printing).

[fol. 277] Points and authorities in support of motion (Omitted in printing).

[fol. 279] Amendment No. 1 to complaint (Omitted in printing).

[fol. 281] [File endorsement omitted]

NOTICE OF SPECIAL APPEARANCE—Filed April 24, 1952

The defendant, appearing specially through his undersigned attorneys, respectfully represents to this Court as follows:

1. The above-entitled case is one of 10 suits involving 17 plaintiffs which have been instituted in this Court against this defendant challenging the Government possession of steel company plants and facilities pursuant to Executive Order 10340, 17 F.R. 3139.

2. Motions for preliminary injunctions have been filed by the plaintiffs in each case.

3. In order to expedite the hearings of these motions and to avoid multiple hearings, the defendant, waiving his rights under Rule 9 of this Court's Rules of Procedure, has consented to a consolidated hearing on April 24, 1952 of all said motions. He has accordingly filed in this Court, or will file prior to the date of hearing, in each case a memorandum of points and authorities in opposition to the motions for preliminary injunctions despite the fact that the five day period

provided for by this Court's rules has not elapsed in every case.

4. The instant plaintiff has instituted 2 suits against this defendant and filed a motion for preliminary injunction in each of these suits. In the above-entitled case, plaintiff has served the defendant with a 20-day summons; in Civil No. 1625-52, the plaintiff has served the defendant with a 60-day summons.

5. The defendant believes that the service upon him of a 20-day summons in the instant case is invalid under Rule [fols. 282-403] 12(a) of the Federal Rules of Civil Procedure. The defendant wishes to make it clear that he, by appearing to oppose the motions for preliminary injunctions at a consolidated hearing, is not thereby waiving his right to file a motion to quash the return of service in the instant suit.

Wherefore the defendant respectfully states that the filing of his memorandum of points and authorities in opposition to the instant motion for preliminary injunction does not constitute a general appearance, and that the defendant will, in due course, promptly move to quash the return of service in the instant case.

Holmes Baldridge, Assistant Attorney General. Marvin C. Taylor, Samuel D. Slade, Benjamin Forman, Herman Marcuse, Attorneys, Department of Justice.

[fol. 283] Opposition to motion for a preliminary injunction, attachments, and affidavits in support (Copies) (Omitted in printing).

[fol. 369] Affidavit of John A. Stephens (Omitted in printing).

[fol. 386] Affidavit of Wilbur L. Lohrentz (Omitted in printing).

[fol. 395] Affidavit of Lewis M. Parsons (Omitted in printing).

[fols. 404-415] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

MOTION TO DISMISS OR, IN LIEU THEREOF, TO QUASH THE
RETURN OF SERVICE OF SUMMONS—Filed April 29, 1952

The defendant, appearing specially through his undersigned attorneys, moves the Court to dismiss the action, or in lieu thereof to quash the return of service of summons on the ground that the defendant is entitled under Rule 12(a) of the Federal Rules of Civil Procedure to a period of sixty days after the service upon him of the complaint in which to answer or otherwise plead.

Holmes Baldridge, Assistant Attorney General,
Marvin C. Taylor, Samuel D. Slade, Benjamin
Forman, Herman Marcuse, Attorneys, Department
of Justice.

[fol. 411] Motion to withdraw verbal amendment and to proceed on the basis of motion for preliminary injunction—granted (Omitted in printing).

[fol. 712] Civil No. 1539-52

No. 11,408

REPUBLIC STEEL CORPORATION, A New Jersey Corporation
with Principal Offices in Republic Building, Cleveland,
Ohio

v.

CHARLES SAWYER, Weschester Apartments, Washington,
D. C.

[fol. 712] Complaint for injunction and for a declaratory judgment and other relief (Omitted in printing).

[fol. 719] Affidavit of John M. Schlendorf (Omitted in printing).

[fol. 723] Summons and service (Omitted in printing).

[fol. 725] Motion for preliminary injunction (Omitted in printing).

[fol. 727] Memorandum of points and authorities. (Omitted in printing).

[fol. 728] IN THE UNITED STATES DISTRICT COURT

[File endorsement omitted]

MOTION FOR TEMPORARY RESTRAINING ORDER—Filed April 9, 1952

Comes now the plaintiff, Republic Steel Corporation, by its attorneys below named, and moves the Court, upon the basis of the affidavit of John M. Schlendorf, filed herein, for a temporary restraining order without notice to the defendant, because it clearly appears from specific facts shown by said affidavit that immediate and irreparable injury, loss and damage will result to plaintiff from the unlawful acts of the defendant before notice can be served and a hearing had thereon, restraining said defendant

(a) From taking any steps or continuing to take any steps whatsoever to effectuate and carry out the provisions of the Executive Order issued April 8, 1952, by the President of the United States insofar as said Executive Order is intended to apply to the plaintiff herein, its officers, agents, and the control and management of its properties.

(b) From molesting or interfering with plaintiff or doing any act or thing which would prevent or tend to prevent [fol. 729] the plaintiff, its officers, agents and employees from operating the plaintiff's said properties for its own account.

(c) From in any respect changing the wages or other terms or conditions of employment in effect at the properties of the plaintiff at the time of issuance of said Executive Order.

(d) From interfering in any other way with the plaintiff's rights of ownership and control of its business and properties.

Hogan & Hartson, by Edmund L. Jones, Howard Boyd; Gall, Lane and Howe, By John C. Gall; Jones, Day, Cockley and Reavis, By Luther Day.
Thomas F. Patton, General Counsel of Republic Steel Corporation.

Proof of service (Omitted in printing).

[fol. 730]. Order denying (Omitted in printing).

[fol. 731] Affidavit of Eugene Magee (Omitted in printing).

[fol. 735] IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

NOTICE OF SPECIAL APPEARANCE—Filed April 24, 1952

The defendant, appearing specially through his undersigned attorneys, respectfully represents to this Court as follows:

1. The above-entitled case is one of 10 suits involving 17 plaintiffs which have been instituted in this Court against this defendant challenging the Government possession of steel company plants and facilities pursuant to Executive Order 10340, 17 F. R. 3139.

2. Motions for preliminary injunctions have been filed by the plaintiffs in each case.

3. In order to expedite the hearings of these motions and to avoid multiple hearings, the defendant, waiving his rights under Rule 9 of this Court's Rules of Procedure, has consented to a consolidated hearing on April 24, 1952 of all said motions. He has accordingly filed in this Court, or will file prior to the date of hearing, in each case a

memorandum of points and authorities in opposition to the motions for preliminary injunctions despite the fact that the five day period provided for by this Court's rules has not elapsed in every case.

4. The instant plaintiff has instituted 2 suits against this defendant and filed a motion for preliminary injunction in each of these suits. In the above-entitled case, plaintiff has served the defendant with a 20-day summons; in Civil No. 1647-52, the plaintiff has served the defendant with a 60-day summons.

5. The defendant believes that the service upon him of a 20-day summons in the instant case is invalid under Rule [fol. 736] 12(a) of the Federal Rules of Civil Procedure. The defendant wishes to make it clear that he, by appearing to oppose the motions for preliminary injunctions at a consolidated hearing, is not thereby waiving his right to file a motion to quash the return of service in the instant suit.

Wherefore the defendant respectfully states that the filing of his memorandum of points and authorities in opposition to the instant motion for preliminary injunction does not constitute a general appearance, and that the defendant will, in due course, promptly move to quash the return of service in the instant case.

Holmes Baldrige, Assistant Attorney General;
Marvin C. Taylor, Samuel D. Slade, Benjamin
Forman, Hermon Marcuse, Attorneys, Department
of Justice.

Receipt of copy acknowledged this 23rd day of April,
1952. _____, Attorney for Plaintiff.

[fol. 737] Stipulation (Omitted in printing).

[fol. 739] Opposition to motion for a preliminary injunction, attachments and affidavits in support (Copies) (Omitted in printing).

[fol. 813] IN THE UNITED STATES DISTRICT COURT

MOTION TO DISMISS OR, IN LIEU THEREOF, TO QUASH THE
RETURN OF SERVICE OF SUMMONS—Filed April 29, 1952

The defendant, appearing specially through his undersigned attorneys, moves the Court to dismiss the action, or in lieu thereof, to quash the return of service of summons on the ground that the defendant is entitled under Rule 12(a) of the Federal Rules of Civil Procedure to a period of sixty days after the service upon him of the complaint in which to answer or otherwise plead.

Holmes Baldrige, Assistant Attorney General.
Marvin C. Taylor, Samuel D. Slade, Benjamin
Forman, Herman Marcuse, Attorneys, Department
of Justice.

[fol. 820] Application for stay of the order granting preliminary injunction (Omitted in printing).

[fol. 822] Designation of record (Omitted in printing).

[fol. 823] Order to transmit original record (Omitted in printing).

[fol. 660] Affidavit of Herman J. Spoerer (Omitted in printing).

[fol. 663] Notice of special appearance (Omitted in printing).

[fol. 667] Motion to dismiss or, in lieu thereof, to quash the return of service of summons (Omitted in printing).

[fol. 1506] [Stamp:] Filed May 6, 1952. Harry M. Hull,
Clerk.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

Civil Action No. 1550-52

THE YOUNGSTOWN SHEET AND TUBE COMPANY, THE YOUNGS-
TOWN METAL PRODUCTS COMPANY, Plaintiffs,

v.

CHARLES SAWYER, individually and as Secretary of Com-
merce, Defendant.

Civil Action No. 1539-52

REPUBLIC STEEL CORPORATION, Plaintiff,

v.

CHARLES SAWYER, individually and as Secretary of Com-
merce, Defendant.

Civil Action No. 1549-52

BETHLEHEM STEEL COMPANY, et al., Plaintiffs,

CHARLES SAWYER, individually and as Secretary of Com-
merce, Defendant.

Washington, D. C.

Wednesday, April 9, 1952.

The above entitled actions came on for hearing on motions
for temporary injunction, before the Honorable Alexander
Holtzoff, United States District Judge, at 11:30 o'clock a.m.

[fol. 1507] Appearances:

On behalf of The Youngstown Sheet and Tube Co: John
C. Gall, Esq., and John J. Wilson, Esq.

On behalf of Republic Steel Corporation: John C. Gall,
Esq., Edmund L. Jones, Esq., Howard Boyd, Esq., and
Thomas F. Patton, Esq.

On behalf of Bethlehem Steel Company: Cravath, Swaine & Moore, by: Bruce Bromley, Esq. Wilmer & Broun, by: E. Fontaine Broun.

On behalf of the Defendant: Holmes Baldridge, Esq. Assistant Attorney General.

[fol. 1508] , Proceedings

Argument on behalf of The Youngstown Sheet and Tube Company, and The Youngstown Metal Products Co.

Mr. Wilson: If Your Honor please, several of us, on behalf of the steel companies, would like to present certain matters to Your Honor this morning.

At nine o'clock I, at the direction of Judge Bastian, extended an invitation to the gentlemen from the Department of Justice to be present, and I understand they are here now.

If Your Honor please, I am speaking on behalf of The Youngstown Sheet and Tube Company. I am associated with Mr. John C. Gall in that appearance.

Also, there will be presented to Your Honor this morning certain matters on behalf of the Republic Steel Company. The Republic Steel Company is, as well, represented by Mr. Gall, Mr. Edmund L. Jones, Mr. Howard Boyd, and Mr. Thomas Patton.

I think, on behalf of Bethlehem Steel Company, Mr. Bruce Bromley and Mr. E. Fontaine Broun will speak at the appropriate time.

If Your Honor please, these matters come on before Your Honor this morning on applications for temporary restraining orders.

[fol. 1509] At ten-thirty or a quarter-to-eleven last evening, the President made a radio address coincident with which he issued an Executive Order, which does not have a number at the moment; at least, my copy does not have a number.

The Executive Order, a copy of which is attached to, I think, all of the complaints, directed Charles Sawyer, who is the respondent in all of the actions, to seize the steel mills and plants of this country, the names of which are listed on a list which accompanies the Executive Order.

The Court: Is a copy of the Executive Order attached to your complaint?

Mr. Wilson: Yes, Your Honor.

The Court: I don't see it there.

Mr. Wilson: I am sure it was, when it left my hands.

The Court: Have you a copy of it?

Mr. Wilson: Yes, indeed, sir.

As I said to Your Honor, the President issued his Executive Order at about half-past-ten or a quarter-of-eleven. In his radio speech, he stated that at midnight Mr. Charles Sawyer, the Secretary of Commerce, would seize the mills.

At approximately 11:30 p.m. last evening, Mr. Gall and I appeared at the home of Judge Bastian and presented to him the papers in The Youngstown Sheet and Tube case. [fol. 1510] We asked him at that time for a temporary restraining order, pursuant to a motion which we had with us to that effect.

He determined that he would set the hearing upon this matter, and the others which are here today, at eleven-thirty this morning, and directed us to notify the Acting Attorney General promptly at nine o'clock to this effect.

At the same time, he kindly agreed that any of the other steel companies which were ready with their pleadings might appear before the Court this morning; and I hope Your Honor will have the same feeling about it.

I should say that at midnight the Secretary of Commerce, Charles Sawyer, acted and seized the steel mills. Of course, our injunctions were designed and are designed to prevent such seizure.

Mr. Sawyer sent out a telegram to the presidents of a number of the steel companies, whose names are listed in a paper which I shall hand Your Honor in a moment, and in this telegram he stated that he was mailing, immediately, copies of the Executive Order of the President, his own Order No. 1, and the notice of the taking of possession.

We have procured from the office of Charles Sawyer copies of these documents. There can be no doubt about their authenticity. They were not available earlier than within the last half-hour. I hope Your Honor will accept them for filing.

[fol. 1511] Gentlemen, do you have copies of those?

Mr. Baldridge: Yes; we do.

Mr. Wilson: Now, if Your Honor please, the Executive Order of the President states that by virtue of the authority vested in him by the Constitution and laws of The United States, and as President of The United States and Commander-in-Chief of the Armed Forces, he made and promulgated the order which I have just stated.

The Order does not refer to any constitutional provisions, nor does it cite any statute or regulation that could possibly or remotely be considered as applicable to this situation. I mean by that, that there is a total omission of specification of the bases for this Order.

The Order No. 1 of the defendant does not depart materially from the language of the Executive Order, itself. I would call attention to the fact, however, that in the first four or five or six lines of Mr. Sawyer's Order No. 1, he says, by virtue of the authority vested in him by the President, "I deem it necessary in the interests of national defense that possession be taken of the plants, facilities, and other properties of the companies named in the list specified in Appendix A. I, therefore, take possession effectively at twelve o'clock midnight,"—and then the remainder of the Order contains many of the statements which appear in the Presidential Order.

[fol. 1512] Now, I should dispose of a technical matter with respect to The Youngstown case.

In certain labor discussions which are the genesis of this matter, one of The Youngstown affiliates, The Youngstown Metal Products Company, was a participant. The result was that in the drafting of the complaint in The Youngstown case, we have two plaintiffs, The Youngstown Sheet and Tube Company and The Youngstown Metal Products Company. It appears that The Youngstown Metal Products Company's name does not appear either upon the President's list or, I think, upon Mr. Sawyer's list. Therefore, it may become necessary, subject to our checking it further, because we haven't had much time, to regard the second plaintiff in The Youngstown suit as, shall I say, surplusage for the purpose of the moment, and somehow dispose of it in due course.

If Your Honor please, the papers which are before Your Honor in The Youngstown case are a complaint which, by the way, we have had verified by the vice-president of the

company; an affidavit in support of this application, likewise executed by the same affiant; and a motion for a temporary restraining order.

I doubt that there is any material difference between the affidavit and the complaint in The Youngstown case. There may be additional matters in the complaint, but the reason [fol. 1513] for two papers is that, at first, we had not considered verifying the complaint and using simply the affidavit, but for precaution's sake we had both of them sworn to.

Now, if Your Honor please, the brief history of this situation is that the union contract of the steel companies with United States Steel Workers, CIO, was expiring on December 31, 1951. In November of 1951, negotiations began, looking towards the ultimate execution of a new contract.

I shall not take the time, because I believe, for my purposes, it is not material, to delineate too minutely the matters in negotiation, in the labor negotiations. I should say to you, very briefly, however, that they involved wages; they involved additional pay for Sunday; they involved the very important question of whether the employees of the steel companies should be regarded and required to be members of the union; that is to say, a union shop arrangement.

The negotiations continued for some time, and the matter was submitted to the Wage Stabilization Board. Eventually, the Wage Stabilization Board came out with a recommendation in favor of certain increases and certain fringe provisions, and for a union shop. These matters were not acceptable to the steel companies in that form, [fol. 1514] but, despite statements to the contrary, the steel companies continued to discuss with representatives of the union and with the members of the Wage Stabilization Board these problems.

The union had given notice that unless a contract was agreed to by midnight last night, there would be a strike. A contract was not agreed to. And so, we say, in order to coerce the steel companies, the President issued this seizure order, and as a result of the issuance of the seizure order, and of its execution by the separate order of the defendant, the strike which was scheduled for one-minute-after-midnight was called off.

Our position is that there is no power in the President,

and no power in Mr. Sawyer, to make the seizure which was made last evening. I shall come a little more in detail about that, because I realize, of course, that it is an important consideration at this time. I do not understand we must resolve to a moral certainty that legal question at this time. I understand the law to be that if we can convince Your Honor that there is reasonable question about the situation, then you will go to the next question, perhaps, of whether there is irreparable injury; and, if so, we hope we can convince you on that.

The Court: Well, there are other factors than irreparable injury; there is a question of balancing equities, when you [fol. 1515] apply for a temporary restraining order of a preliminary injunction.

Mr. Wilson: All right, sir; I will not dispute that with Your Honor at this time. I think, frankly, it is not a question of balancing the equities. I think the equities are 100 percent on our side.

The Court: I am not prejudging that, but I am only suggesting that irreparable damage, or the possibility of it, is not the only matter for the Court to consider.

Mr. Wilson: I meant to say that I am satisfied to meet that situation, too, as we meet the others.

If Your Honor please, we are willing to assert that there is no provision of the Constitution and no statutory provision that would support this seizure. With Your Honor's permission, I would like to say it just that way and, in a sense, ask Your Honor to call upon the Department of Justice to give what might be called a bill of particulars in that field. I mean, I am perfectly willing to prove a negative here, if Your Honor would care to hear from me in greater detail on that point.

The Court: You proceed in your own way. I will let each counsel proceed in his own way. You will have to make your own decision as to how you argue the matter.

Mr. Wilson: Yes, Your Honor; I am perfectly willing [fol. 1516] to do that.

I say to Your Honor that you may begin with the preamble to the Constitution, and you may conclude with the last Amendment to the Constitution, and there is no jot or tittle in the Constitution that will support this seizure.

Certainly, the Supreme Court has had occasion in more

than one case to point out that there are no inherent powers in the situation in the President; that his powers are the powers which are expressly provided and those which are reasonably to be derived therefrom; but I mean, there is no reservoir of intangible powers in the President as Commander-in-Chief or as President of the United States or, let's see what other bases he states—I think those are the two bases under which he purports to act.

We say as well, if the Court please, that there is no statutory provision which even remotely supports this situation. We say, the history of the various Acts is entirely to the contrary.

We say the War Labor Disputes Act, which was involved, for example, in the Montgomery Ward case, has gone out of existence. We say that the legislation which followed, for example, the Labor-Management Act, the so-called Taft-Hartley Act, supports the very opposite of the situation, and that there is no provision whatsoever in there to justify [fol. 1517] or authorize this seizure.

We say, as well, that the legislative history of the Taft-Hartley Act demonstrates the contrary, since efforts were made to put seizure provisions in the Act, and they were not adopted.

So, here, again, in our effort in the opening to prove a negative, I would say to Your Honor that our examination of the authorities, our examination of the statutes—those which formerly existed and those which presently exist—lead us to the clear and inevitable conclusion that there is no statutory authority for the action of the President in this case.

Coming to the question of irreparable injury, I certainly do not have to repeat the chief thing which has happened here. The property of citizens of The United States has been seized by this respondent. It happens, perhaps, that it is not my property at the moment, nor your property at the moment, but it is property of fellow-citizens of ours, which the respondent in this case has reached out and taken away from us.

We are not in a state of war, legally speaking. We are not in a situation where a requisition has occurred. We are not in any other situation where a seizure of any sort can be justified, except by the arbitrary use of power, as

it exists at the moment, illegally, I say, but as it is exercised [fol. 1518] at the moment by the respondent in this case.

The result is, to repeat and to emphasize, because it is the crux of our problem here, that our property has, as of midnight, been summarily and illegally taken away from us. We are no longer in control of the management or operation of our own plants, our own facilities. They are clearly taken away by Mr. Sawyer, in his order. The fact that in his order, which is somewhat a copy of the Presidential Order, he has selected the presidents of the companies to be the operating agents of the companies, is no excuse for this act. They are the agents of the companies, so I am sure it will be contended, and the result is, that the Government—I shouldn't say "the Government"; I should say the respondent in this case—is in full control of all the physical properties and the real estate, for that matter, if there is a distinction, of the plaintiffs in this action.

The moving papers and the complaint in this case make this point as one of the principal points, after setting forth what we regard as the primary proposition here, namely, that our property is taken away from us.

Our second point is, why it is taken away from us; and while motives, as such, may not be important to Your Honor, the consequences of the move, I say, will become [fol. 1519] important to Your Honor.

What happens here, what can happen here, and what we say is happening here, is that the seizure is a coercive effort by this respondent to compel us to enter into a union contract according to the recommendations of the Wage Stabilization Board, which recommendations have no legal effect whatsoever in this situation.

We point out in the moving papers that not only from the dollar side of things, the conditions which are sought to be imposed upon the steel industry in these cases, and, more particularly, because I am speaking for Youngstown, imposed upon the plaintiff in this case, are so burdensome financially that we will not be able to sustain them without a corresponding increase in price.

The Court: I don't think I can go into that.

Mr. Wilson: I am well aware of that, and I am moving from the motives and the details to a result, which is very crucial.

Another feature is this union shop situation. That can't be measured in dollars-and-cents. That is trying to cram down the throats of the steel industry a method of employer-labor relations, policy-management control contrary to and against the will of the steel companies.

I wanted to reemphasize those things to make this point: We say, that based upon prior experiences in similar situations, more specifically in the coal industry, that when the Government makes a seizure such as this, it then steps in and makes a contract with the union, and it makes a contract with the union which burdens the business of the plaintiff; and it turns out, aside from the question of whether the contract is one which might legally survive the return of the property to the steel company, it turns out that it is made a condition of return to the steel company. That is to say, we fear it will be made a condition of return, as it was a condition of return in the coal industry.

The Court: Of course, I can't consider that. You are trying to prognosticate the future, what the Government might do at some future time. The mere fact that the Government might do something, which you say would be illegal if it did it, is no reason, in itself, for granting an injunction at this time.

Mr. Wilson: Yes, sir, I think it is, sir, if you will permit me to differ with you, because here, we are here on an application for a temporary restraining order, and we are saying to Your Honor that, "Stay the hand of this defendant from doing that very thing for ten days or twenty days, until you can investigate more thoroughly this problem—perhaps receive an answer from the respondent, and consider the thing materially."

[fol. 1521] The Court: I would be very glad if you would address yourself to the question as to why the drastic remedy of a temporary restraining order, or a preliminary injunction, is necessary at this particular time. You have just suggested that there should be 20 or 30 days to investigate those matters. Well, why do you need an injunction in the meantime?

Mr. Wilson: I am addressing myself to those matters, in my judgment, at this moment, if Your Honor please.

I am saying that, contrary to the simplest principles of

the American way of life, our property was taken away from us last night, illegally.

The Court: By an action in this Court, of course. But you are asking for the extraordinary remedy of a temporary restraining order, or a preliminary injunction, and you have to make a showing why you are entitled to that drastic remedy; because, after all, courts are loath to grant preliminary injunctions except on a very strong showing.

Mr. Wilson: I go back to the matter that I was discussing when this immediate colloquy came up. I say it is not speculation; it is not the expression of a possible fear that this respondent may enter into a labor contract and saddle this industry with this unwanted and unacceptable contract; I say, in the Executive Order of the President, himself, he said, in paragraph 3:

[fol. 1522] "The Secretary of Commerce shall determine and prescribe terms and conditions of employment under which the plants, facilities, and other properties, possession of which is taken pursuant to this order, shall be operated."

I say to Your Honor that the record before Your Honor shows a policy of the Government in previous cases to do the very thing about which I am now complaining, and to saddle the industry with a Government-made contract, and not return the property to industry without the willingness of the industry to accept the Government-made contract.

I say, that if I came before Your Honor today with a motion for a temporary restraining order to enjoin my neighbor from cutting down my tree, if the tree isn't cut down before I come into the courtroom, all I can come in and say is that he has got an ax or a saw, and he is out there hacking away on the trunk of the tree, and that is some kind of reasonable fear; and I say to the Court, in this case, that I do not have to come in with a written letter from Mr. Sawyer in which he says, "The day after tomorrow, I intend to make a contract with the union." I say, the facts speak for themselves. I say, the history of the conduct of the Government in similar matters can be drawn upon by us in this situation to explain the reasonableness of our position.

[fol. 1523] I point out to Your Honor that Mr. Sawyer is empowered by the President of the United States to make arrangements and agreements covering the wages and conditions of employment, and terms, of the employees. And I say, that may be done before the ten days are up. I say, that may be done before we have an opportunity to argue a motion for a preliminary injunction. I say, that may be done before the respondent in this case has filed his answer; and I say, that once that is done, that is an irreparable injury for which we may not be compensated in any Court in damages or in any other manner. So, I say, it is a situation which can arise, and which could have arisen before we even got before Your Honor at eleven-thirty today; and it can arise, if Your Honor should deny this application for a temporary restraining order, before the day is over, or could happen tomorrow, or within ten days, or before Your Honor hears the preliminary injunction.

That is an irreparable situation. That is a situation from which we can never recover, and it is a situation which can arise, and is not whimsical; it is not imaginary; it is not, certainly, fearful; it is based upon a practice and policy of the Government in every other kind of situation as this is.

Now, I should like to add some other reasons which I think are evidence of irreparable injury.

[fol. 1524] In paragraph 14 of the complaint, we have stated them in one fashion, and in several of the paragraphs of the affidavit we have stated them in a similar fashion. The paragraphs are very brief. I am always reluctant to read matters to the Court. I see Your Honor is examining them; but while Your Honor is examining them, I will go over them briefly, to lay some emphasis upon it.

We say, again, as I have endeavored to emphasize several times this morning, that this is a seizure of our property which would deprive the plaintiffs, without due process of law, of our own property.

We say, secondly, that:

"Said seizure will result in the disruption of normal customers between the plaintiff and their customers,

the great majority of whom have pending orders with the plaintiffs for steel and steel products usable and to be used in the civilian economy of the United States having no relation to any war effort of the United States."

The Court: I have read these paragraphs.

Mr. Wilson: All right, sir.

More specifically, we go to the affidavit, since it comes more directly to the point about which I am talking.

We point out, in the three paragraphs of paragraph 8 [fol. 1525] of the affidavit, that the defendant and his agents now are in our businesses. That the defendant and his agents have control of our trade secrets and methods of doing business, which are confidential with us.

The Court: May I inquire this: The order appoints the president of your company as the operating manager on behalf of The United States; how does the Government get control of the confidential matters and secrets, so long as the president of the company is the operating manager?

Mr. Wilson: I think there are two answers to that, Your Honor. I know, when I make you one answer, that Your Honor will give me an answer. If I say this to Your Honor, "How do we know tomorrow that Mr. Sawyer will not send Mr. X, his own agent, into the plant?" I know what Your Honor will say in answer to that: "Wait until Mr. Sawyer sends Mr. X into the plant."

The Court: I think you have anticipated correctly.

Mr. Wilson: On the other hand, Your Honor will agree with me that Mr. Sawyer, himself, can go into anybody's plant today; that he could ask to see confidential information and trade secrets. I mean no reflection on the integrity of Mr. Sawyer, as an individual, because he is a highly honorable individual; but I do mean, and I say on this point, I don't have to wait until Mr. Sawyer calls me up and says, "I am going in your plant tonight,"—I don't [fol. 1526] have to wait for that, to run down here to Your Honor and say, "Our trade secrets will be invaded, our confidential business data will be scrutinized, maybe dissipated, maybe passed to competitors, because this is a highly competitive business. I say that the reasonable likelihood of those things occurring, on the face of this record, are

with Your Honor this morning. Those are irreparable situations.

Here we have a highly competitive business, with our own trade secrets; with our own methods of doing business; with our own lists of customers. And, some common denominator in the form of this respondent, who has access, let us say, to the files of Youngstown at ten o'clock, and to the files of Republic at eleven o'clock, and to the files of Bethlehem at twelve o'clock, who may, if he chooses, pass the information from one on to another—and that is not an absurd suggestion; in the very nature of this thing, that may occur.

Now, once that has occurred, that can never be recovered. Those are irreparable consequences of this move.

We speak, in paragraph (a) of paragraph 8, about the trade secrets. We speak, in paragraph (b) about the relationship with our customers; and we speak, in paragraph (c), about the technical nature of the operation of our business. And there, if you please, we are faced with [fol. 1527] the grave danger of inexperienced instructions and directives actually wrecking our plant, and the huge investment which we have in our properties.

The Court: You don't have that danger, so long as the president of your company is the operating manager.

Mr. Wilson: Your Honor, I say—and may I repeat it for emphasis' sake—

The Court: Yes, indeed.

Mr. Wilson: I say to Your Honor that it is inherent in this situation that Mr. Sawyer, the appointive power, may choose to call upon a plant today, and call for records. Now, do I have to wait until that occurs, before I must run down here and ask Your Honor for temporary relief? I say to the Court that those are things that may reasonably be expected to occur and, sitting, as Your Honor does, as a Chancellor in this situation, in view of those probabilities, that Your Honor should stay the hand of Mr. Sawyer in this situation until you have had an opportunity to consider this thing very thoroughly.

Your Honor is patient with me—and you must be longer patient, because others want to talk, and I don't want to usurp all of the time here this morning—I come back to the legal proposition, about which there is no doubt, I come

back to the proposition that there is no legal basis for this act. I come back to the proposition that in that situation [fol. 1528] Your Honor should stay the hand of the respondent in this case until you can investigate that situation thoroughly.

Coming to the question of the equities, which I don't wish to avoid in my discussion here: This matter of the way the President discusses it, that the safety of the Government is involved, I say to the Court that the real reason here—and it is not one that must be inferred from the situation—is a coercive effort by governmental authority to cram a labor contract down the throats of industry.

The Court: You have covered that point.

Mr. Wilson: All right, sir. Now I want to conclude, if I may, with one little reference to a quotation from one of our forebears, Henry Clay, in which he was thinking about this kind of a situation when he said this:

“... Inherent power: Whence is it derived? The Constitution created the office of President, and made it just what it is. It has no powers prior to its existence. It can have none but those which are conferred upon it by the instrument which created it, or laws passed in pursuance of that instrument. Do gentlemen mean by inherent power such power as is exercised by the monarchs or chief magistrates of other countries? If that be their meaning they should avow it.”

And I am waiting interestedly and intensely to see if that is the theory upon which the Department of Justice will undertake to defend this unlawful seizure in this situation.

Thank you.

ARGUMENT ON BEHALF OF REPUBLIC STEEL CORPORATION

Mr. Gall: May it please the Court—

The Court: Whom do you represent?

Mr. Gall: Your Honor will note I am on the pleadings for both Youngstown and Republic. I am speaking now for Republic Steel Corporation. And, as I am associated with Mr. Wilson in connection with the pleadings, I should like to associate myself with him in connection with the views

and arguments to which Your Honor has listened so patiently.

I do not intend to cover the ground covered by Mr. Wilson in any detail. The most that I can do, I think, Your Honor, is to try to reinforce one or two points to which he has already adverted.

Republic Steel has filed with the Court substantially the same kind of complaints, affidavits and motions as have been filed on behalf of Youngstown Sheet and Tube Company.

The remedy we have asked the Court for is the same as that asked for by The Youngstown Sheet and Tube Company.

[fol. 1530] Your Honor has referred to this, very properly, as a request for an extraordinary remedy. And we want to say to you, with all the feeling that we can, that we think an extraordinary remedy is necessary because of the extraordinary action which the President took last night in conferring upon Mr. Sawyer complete dominion over the plants and properties and facilities of Republic Steel Corporation.

It is true, Your Honor, that Mr. Sawyer has not in his first order undertaken to exercise that complete dominion. However, he does assert it, in that the present officers of the corporation are in fact permitted by his order to continue to exercise certain of their functions for the moment. It is perfectly reasonable, however, for us to have a fear of imminent and irrevocable damage to the properties and business of Republic Steel Corporation.

Your Honor has said that we cannot foresee what the Government is going to do, or anticipate that it is going to do things which will put burdens upon this company for the future. We feel, however, that we are entitled to guide our own policies and our own views, as expressed to this Court, by the experience that we have had in the past under seizure of certain of our properties. I know of no better way of considering what may happen than what has happened in the past.

The coal mines of Republic were seized on several [fol. 1531] occasions by the Government of The United States, and were operated by the Government of The United States; and on two occasions, while the mines were in possession of the Government, contracts were made between

the Government agent and the United Mine Workers of America, one in connection with the portal-to-portal matter in 1943; the other, in connection with the so-called Welfare Fund, I believe, in 1945. We were unable to get our properties back, except by taking over and operating under the contract which had been made by the Government with the union.

On those occasions, Your Honor, the management of Republic's mines was not ousted. The mines were still nominally in possession of and under the dominion of Republic Steel for that purpose. As a matter of fact, however, everything that was done by the management in the control and operation of those mines was determined by an agent of the Government, just as Mr. Sawyer is an agent here for that purpose. And elaborate regulations and manuals of operations, and so on, were promulgated by the Government agent in that case.

We have reason to fear that, based on that experience, we may expect, no matter how reasonable, Mr. Sawyer is, if it becomes necessary or desirable from his standpoint to exercise the more complete and intimate control over the affairs of Republic Steel Corporation, he will do so. We [fol. 1532] think we are entitled to some protection against that, until the entire merits of this matter can be examined.

May I refer to the matter of the power to seize and operate these properties? Mr. Wilson has covered that at some length.

We can find no warrant, and we find no claim to warrant, except in the most general terms in the Executive Order itself; we can find no warrant in anything specific or fairly implied from any provision of the Constitution, or, certainly, from any statute.

Your Honor, on that point, that there is no authority in the President to do what he has done, or in Secretary Sawyer to exercise these powers, may I refer to a contemporary matter which has a very direct bearing on it?

Day before yesterday, April seventh, the President of the United States sent to the Congress, addressed to the Vice-President, a communication which appears in the Congressional Record of April 7, 1952, in which he asked the Congress to extend by statute certain emergency powers which he said would expire when the treaty of peace with

Japan is consummated; and among the powers that he listed as expiring when a state of war should expire, was the power to continue the seizure of the railroads.

Now, the President has statutory power, today, for the railroad seizure, which is in progress. He does it under [fol. 1533] an express power given him by Congress during a state of war.

The Court: Technically, we are in a state of war today, are we not?

Mr. Gall: The President does not think so, and he does not claim—in fact, he expressly says, in this communication, that if the treaty of peace with Japan shall be concluded, his power to hold the railroads will no longer exist.

The Court: Yes, but until the treaty is signed, we are in a state of war, are we not, technically?

Mr. Gall: As far as Japan is concerned.

The Court: But still we are in a state of war.

Mr. Gall: But he is not purporting to act as in a state of war; his Executive Order does not claim so.

The Court: Do you contend that the President must cite the authority for his act—

Mr. Gall: (Interposing) I do not so claim, Your Honor.

The Court: Or that any Government official must cite?

Mr. Gall: I do not so claim, Your Honor. I do claim that we should be able to discover it somewhere when it is challenged, however, and we have been unable to discover any such power.

I think, Your Honor, it is quite relevant to consider that [fol. 1534] the President, himself, in an address to the Congress only day before yesterday, considered that his power to keep control of the railroads under an express statute will no longer exist, unless he has further statutory authority.

Also, in this morning's Daily Labor Report—I realize, Your Honor, that is not an official report; that is a service which many of us get here in Washington, with which Your Honor may be familiar—but the measure which the President sent to the Congress on the seventh of April, this month, with respect to the continuation of his emergency power, was referred to the Senate Judiciary Committee; and, yesterday, the Senate Judiciary Committee reported that measure favorably to the Senate. But, in doing so, it inserted an ex-

press proviso that limited the President's power of seizure of property to public utilities.

Now, it may be said that the President has some power independent of legislation. His own conduct in recommending to Congress an extension of his emergency power, so that he could continue the seizure of the railroads, negatives, in our view, even a claim on his part that he has such power, except in pursuance of statute.

I also say, Your Honor, that when it comes to balancing the equities in this matter, the position for which we contend, and the action which we are asking the Court to take, [fol. 1535] does not leave the Government remediless. We are left remediless, in a practical sense, if some of the things which we have reason to fear the Government may do in connection with our property should take place. The Government has other remedies than the seizure of our properties.

The Congress specifically has provided a remedy to be used by the Government, as appropriate in any national emergency growing out of a labor dispute. No one can contend that this emergency, so far as there is one with respect to steel, does not grow out of a labor dispute.

The Labor-Management Relations Act of 1947, as Your Honor so well knows, has in it a provision for the granting of injunctive relief at the request of the Government of the United States to stay a stoppage in a situation such as this, in the steel industry, as of 12:01 last night. The Executive has not seen fit to use the machinery and the remedy provided by Congress.

Furthermore, the Executive Branch of the Government is not the only one that has some responsibility for protecting the Government's interests in a situation of this kind. The Congress is in session, and if the President feels that he does not have such power to deal with this situation otherwise than by seizure, Congress is in session and could act, and undoubtedly, if the President requested emergency [1536] powers of some kind, the Congress would review and determine to what extent it was willing to give him those powers.

In conclusion, Your Honor, we think that we have stated in our petition, in our complaint and in our affidavit, facts which indicate a very real probability, particularly based on our past experience, that action may be taken

which will work irreparable harm to the properties of Republic Steel Corporation; and we believe, sir, that we are entitled to some relief, which relief, in our judgement, would not in any way harm the interests of the Government of the United States, which has other remedies available to it under the law.

Thank you.

Your Honor, I would like to introduce to the Court Mr. Thomas F. Patton, General Counsel of Republic Steel Corporation, and a member of the Ohio Bar, if Your Honor would be willing to hear him.

The Court: Do you move his admission for the purpose of this case?

Mr. Gall: I move his admission for the purpose of this case.

The Court: Mr. Patton may be admitted for the purpose of this case.

Mr. Patton: Thank you.

[fol. 1537] If Your Honor permits, I would like to make just a few brief, practical observations with respect to the question you raised as to the balancing of equities.

In the first place, I think it is quite apparent that if the purpose of the President in issuing his Order was to assure the continued production of steel, there was available to him, under the Labor Relations Act, a plain, lawful method set forth by the Congress for accomplishing that result. All he had to do was to appoint a board, a few days ago; have that board say that there was a strike about to happen which would threaten the national security. And he could have come into this court, or any similar court, and have had an injunction enjoining the strike for at least 60 or 80 days.

The Court: Mr. Patton, may I ask you this question: Of course, a Court can't take cognizance of anything except the record before it. There were, however, some radio reports that I happened to hear this morning, before I knew that this case would come before me, to the effect that some of the companies have suspended operations and have refused to permit their employees to return to work this morning. Are those reports correct, if you care to answer the question?

Mr. Patton: Well, I will explain that situation, Your

Honor. You have to understand the steel industry. As [fol. 1538] the union recognized, in connection with the strike, it said it would give 96 hours' notice in order to permit the industry to close down, because in the steel industry you have great furnaces that must be cooled and emptied of their material; you have coke ovens that must likewise be handled in the same way. So, when you talk about resuming operations—and I might say, that pursuant to that notice the entire industry, I know our own company was, was down completely at midnight last night—so, it is quite a job to resume operations.

And, in Republic's case, no telegram was received in Cleveland until about nine o'clock this morning, and Mr. White, who is the president of the company, to whom the telegram was addressed, had been in New York on these very union negotiations.

As rapidly as it is possible, in an orderly fashion, unless this Court decrees otherwise this morning, operations will, of course, be resumed on the next shift, or whatever shift is necessary. But that is one of the points I would like to make to Your Honor.

The Court: I wanted to know about that, because it seemed to me that if the companies weren't willing to resume operations, why, they don't come to the Court—if I may use the term in the technical sense—with clean hands. [fol. 1539] Mr. Patton: Well, you must realize, as I said, that this industry is a peculiar industry. It is now down, completely. If Your Honor doesn't grant the restraining order requested this morning, the industry must go to the expense of spending thousands and thousands of dollars to get its operations back to normal. If Your Honor does grant the restraining order, it will only be a very short time before you can hear this case in a more thorough sense, and nobody will be hurt in the interim. And why won't they be hurt? Because, I think, you can take it as a judicial fact that every company has at least 30 days' inventory of steel for its operations, and you can take judicial notice of the fact that for the short time necessary for you to dispose of this case, there will be steel available to the customers.

On the other hand, if Your Honor should refuse it, and the company has to resume operations, and then after you

hear the case the employees say, "We won't work any longer, because we are now not working for The United States Government"—and I am sure they will—then we must shut down again, and spend thousands and thousands of dollars, again, in a few days, shutting down our operations.

So that, it seems to me, the equities are all with the companies in this situation, and that you can preserve the status quo for the short time necessary for you to reach [fol. 1540] a conclusion on the legal points in these matters, and that the companies should be given the benefit of that short stay, rather than the Government.

Nobody is being hurt, because everybody has steel for at least 30 days, and that is the minimum; so, I say, the equities are with us in this situation this morning.

I would like also to point out one other thing: If, after a more thorough consideration, Your Honor decides that this seizure is illegal, then the action of the Secretary of Commerce will not have been an action in his capacity as a Government official.

Now, we have a remedy, but it is against Mr. Sawyer, as an individual. Maybe the Government will accept claims for damages—maybe we have some rights against it; at the moment, I am not sure—but I am sure you will realize that there will be millions and millions and millions of dollars in damages involved, and I don't know whether Mr. Sawyer will be willing or ready or able to respond.

The Court: Wouldn't you have a claim under the Federal Tort Claims Act against The United States, if this is an unlawful seizure?

Mr. Patton: If it is, then that is the individual action of the officer, and we may have some trouble on that.

The Court: Well, yes; but under the Federal Tort Claims [fol. 1541] Act, the Government waives its immunity to suits for damages for torts committed by its officers and agents, with certain exceptions; and now, with certain exceptions, actions for damages in tort run against the Government quite as much as they do against a private corporation or a private individual.

Mr. Patton: I hope you are right, because I am sure Your Honor is going to hold that Mr. Sawyer's seizure under

the President's Order was illegal, and he will have some damage suits.

The Court: I am not going to try any damage suit now under the Federal-Tort Claims Act, before such a suit is filed, anyway; I am inquiring, if you don't have a remedy under this Act?

We will continue this after the recess:

(Thereupon, at 12:30 o'clock p.m., the hearing was adjourned until 1:45 o'clock p.m.)

[fol. 1542]

AFTER RECESS

(The proceedings were resumed at 1:45 o'clock p.m., at the expiration of the recess.)

Mr. Broun: Your Honor, I am E. Fontaine Broun of the Washington firm of Wilmer & Broun. We are local counsel for the plaintiffs Bethlehem Steel Company, et al., in No. 1549-52:

I would like to move the admission for the purpose of this proceeding of Mr. Bruce Bromley of the New York firm of Cravath, Swaine & Moore, who is a member of the bar of the highest court of New York and the Supreme Court of the United States.

The Court: It is a pleasure to have Mr. Bromley.

Mr. Bromley: May it please Your Honor, I thank you for receiving me.

ARGUMENT OF BEHALF OF BETHLEHEM STEEL COMPANY

Mr. Bromley: With characteristic keenness and clarity Your Honor has put two questions to the plaintiffs' side of the table, satisfactory answers to which I think must be furnished you in order for us to prevail.

I refer to your suggestion that possibly in a consideration of the relative equities here, that the damage to the plaintiffs, although it may be irreparable or at least severe, your question suggests might be balanced or at least, or even outweighed by damage to our nation as a whole. [fol. 1543] Now, I assert that that is not so, and I say that for this reason: There is no emergency facing this country which has not been created by the action of our President himself:

Now, that is his own choice. He said last night:

"I can't go under the Taft-Hartley Act because it might take me a week or two."

Now, let's examine that. The Taft-Hartley Act requires that a board of inquiry be convened and that it report the facts to the President and thereafter the Government should — move against the union for at least eighty days under the injunctive provision.

Isn't it perfectly plain to any observer that the President could a week ago, ten days ago—this afternoon, if you please—constitute the present Wage Stabilization Board, that board of inquiry who could within sixty minutes report to the President what the situation was, and the machinery of that Act be launched on its intended course.

So I say to you that the situation is of his own creating which does not lessen, perhaps, the danger to the nation if it be too late to correct it, but it is not too late to correct it, and he should take that course of action now which is perfectly possible of immediate accomplishment instead of subjecting the plaintiffs to unlawful seizure of their property to untold damages, and to great injury to our democratic system of government. Because this scheme of governing by Executive edict in the absence of Congressional authority, I say poses grave questions of grave danger to this country.

Now, why do we need a temporary restraining order, says Your Honor, and that is the second question, I think closely allied to the first. Well, I had assumed we needed it badly because, as counsel this morning said, if the seizure is unlawful we must content ourselves with a suit against Mr. Sawyer who may not—I hope he has, but who may not have quite enough money to pay our damages.

And Your Honor I thought very properly said, "What about the Tort Claims Act?"

Now, I say to Your Honor that the Tort Claims Act gives us no remedy whatsoever, and I hope I can demonstrate [fol. 1545] it in this fashion:

First, what is the affirmative grant of jurisdiction against our Government under the Tort Claims Act? Well, that is to be found in the jurisdictional section.

The Court: I am familiar with the Tort Claims Act, quite familiar with it. I participated in drafting it.

Mr. Bromley: Yes, sir, I know you did, but I want to make sure that Your Honor agrees with me that there is no grant under that section of any right to sue Mr. Sawyer.

The Court: No, but isn't there a grant to sue the United States for damages?

Mr. Bromley: I didn't mean what I said. There is no grant under that section to sue the United States for any act which Mr. Sawyer takes while acting within the scope of his office or employment.

I am talking about the jurisdictional section, sir; Section 1346 of Title 28 of the U. S. Code.

Let me read it to you so that I may get it a little more clearly in my mind than I seem to have:

"(b) Subject to the provisions of Chapter 171 of this Title. . . ."

That is the Tort Claims Act.

"The District Courts shall have exclusive jurisdiction of civil actions on claims against the United States [fol. 1546] for money damages . . . for injury or loss of property, or personal injury, or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, . . ."

Now, if Mr. Sawyer is not lawfully authorized to seize our plants, I submit to Your Honor that he is not acting within the scope of his office and that we have no remedy against the United States Government. And if that is not clear enough, sir, I beg to call your attention to the exception contained in Section 2680 of Title 28 of the Tort Claims Act, which I think makes assurance doubly sure that we have no right against the Government, for it says:

"The provisions of this Chapter. . . ."

That is Chapter 171.

" . . . shall not apply to—

"(a) any claim based upon an act or omission of an employee of the Government exercising due care in

the execution of a statute or regulation, whether or not
... valid, ..."

Now, that is an exclusion, sir, and this executive order under which Mr. Sawyer purports to act, is a regulation. And all liability against the Government for any act taken by Mr. Sawyer, whether that regulation be valid or invalid, [fol. 1547] is, I think, excluded from the scope and coverage of the Tort Claims Act.

The Court: I don't understand that an executive order directing the doing of some specific act is a regulation.

Mr. Bromley: That is a question which must be resolved, and I have found no decision on it. Because, of course, this Act was passed to protect people from being run down by mail trucks, not to be applied in this situation. So it is not surprising that we have no decision, and I respectfully submit to Your Honor that the broad language "statute or regulation" should include an executive order such as this, and I certainly think that it does as a matter of construction, and I certainly think that we would get cold comfort out of the attempt to assert any right against the Government if it turned out that Mr. Sawyer's seizure was unlawful.

Now, may I call Your Honor's attention in connection with my assertion that the President has deliberately taken the wrong route when the right route was open to him, that is, the Taft-Hartley Act. I wish Your Honor would look again at the President's order, because in paragraph 3—numbered 3—your attention has been called to the fact that it provides:

"The Secretary of Commerce shall prescribe the [fol. 1548] terms and conditions of employment under which the plants shall be operated."

Now, that is the only affirmative direction in the whole order, because if you look at the succeeding paragraphs you see:

"Except so far as the Secretary shall otherwise order, the management shall continue"—

the plant operations shall continue, the money shall continue, the dividends shall continue. The sole purpose of this order on its face, I say to Your Honor, was to empower the Secretary to impose upon these plants recommendations of the Wage Stabilization Board which were not binding upon them. And I think the Government owes it to Your Honor to tell us now, before Your Honor makes up your mind whether you will sign our restraining order or not, to tell us now whether Mr. Sawyer is going to put these onerous terms and conditions in effect today or tomorrow, or not. And I think we should at least have a stipulation out of them that the status quo in that regard will be maintained until this important question, important to our very national existence, I submit, be determined as a matter of law. And I hope my friend Mr. Baldrige will respond to that prayerful inquiry.

And now may I impose upon Your Honor to say a word [fol. 1549] about the fundamental question of power? And I do that hoping I can make a little progress, because I think the Government ought to tell Your Honor today that there is no statutory provision upon which they can place any reliance. It is perfectly plain that there is in existence today no statute from Congress which authorizes seizure of our plants for the purpose of settling a labor dispute—like the War Labor Disputes Act was, now no longer in existence.

Therefore, they have to go to some other kind of an Act, and I think they can only go to two such Acts, and I think they should disavow that either covers, but I must mention, I think in the interest of expedition, the Selective Service Act of 1948 and the Defense Production Act of 1950.

Now, let's take the easiest one first. The War Production Act of 1950 merely authorizes the requisition of supplies or equipment when all other means of obtaining those parts or supplies upon fair and reasonable terms have been exhausted.

It is a sort of a condemnation statute. It applies first to personal property, supplies and articles, and then it applies to real estate. But, as to real estate, the only power is to bring a court proceeding of condemnation. [fol. 1550] So I think you have got to admit at once—

and I think Mr. Baldrige should admit at once that he does not place any reliance upon that Act at all.

Now, let's go to the Selective Service Act. Section 18 of that Act, as I read it, provides that if a company gets an order under that Act and each one of these complaints, may it please Your Honor, before you alleges that no one of these companies has any such order as is provided for by Section 18, and the provision there is that if the President gives an emergency order under this statute for the benefit of the Armed Services or the Atomic Energy Commission, and the contractor fails or refuses—and I submit that means being able to do so—fails or refuses to fill the order, then seizure may take place.

Now, the fundamental keystone, if anyone seeks to erect an arch or tower on that statute, is missing. We have never got any such order, and if we were struck and our plants were closed, then I think under the statute we could not be guilty of failing or refusing to fill such order.

The Court: But there is no strike.

Mr. Bromley: There is no strike now, no, sir, and nobody has invoked the provisions of this statute yet, and that is the reason I am trying to throw it to one side and come [fol. 1551] to what I think Mr. Baldrige ought to argue, and that is what about the Constitution.

Now, the Constitution, I suppose we have to start off with Article 2, and there are three sections there that might possibly give some grant of power relevant to this situation.

The first one is that the executive power shall be vested in the President. And the second one is that the President shall be Commander-in-Chief of the Army and Navy. And the third one is that he shall take care that the laws be faithfully executed.

I do not believe there is any other section of the Constitution to which my friends can point, and I take it that the one to which they are most apt to point is the one that makes our Chief Executive Commander-in-Chief of the Armed Forces.

Well, what's his power as such? I think first it should be said that it is undoubtedly true that there is no undefined residual of power in the Executive, unspecified power which comes to him in the public interest. He has got to look

to something in the Constitution and it would not do him any good to declare the kind of emergency that is now in existence, I submit a somewhat strange document that he declared in 1950, because I don't think he no more than any- [fol. 1552] one else could pull himself up his boot straps, and unless the declaration of emergency brings into being some power which is expressed to be given him in the Constitution or in a statute, the mere declaration of the emergency accomplishes nothing.

What can he do as Commander-in-Chief? Well, first we are not at war with Korea, I assume as lawyers, although to everybody else in this court room we certainly would be.

What about Japan? Your Honor was quite right. We are this very minute in a technical state of war with Japan.

Why? Well, simply because everything having been done by all the ratifying powers in the world, everything having been done by our Senate which has consented and approved ratification, the document which the President must sign is on his desk. He has not signed it.

When he does sign and deposit it, war is over.

Now, that is the reason he went to Congress the other day, because it was upon the existence of that technical state of war that others of his powers depended, and he knew he would have to sign this ratification promptly, I assume, so he went to Congress and he asked them to extend the war powers for another sixty days, and they did, [fol. 1553] and on the floor of the House it was made abundantly clear that Congress did not intend thereby to give the President any power to seize the steel plants.

So I must frankly say to Your Honor that there is a technical state of war. I think it is about the thinnest and the most technical state of war in which we have ever been, but there it is.

Now, I say to Your Honor that even in time of war the Commander-in-Chief, the President, has no power to seize private property in these circumstances. I think he can only do so, that is, his authority can only be exercised to do so in the area of conflict, or, if outside that area, at a time when the clear and present danger of national disaster is so overwhelming that, as a practical matter, nothing else will satisfy the demands of the safety of our people. And I think a consideration of our brief on that point and

the cases in support of it will demonstrate the soundness—

The Court: Is there a brief? It has not been handed to me.

Mr. Broml y: Yes, sir, with our papers we have a statement of points and authorities which is somewhat longer, I understand, than may be the practice.

The Court: Oh, yes.

[fol. 1554] Mr. Bromley: It is a brief on the law, and it is a brief on the law as to the President's power under the Constitution.

And my friends on the other side have it.

Mr. Baldridge: We do not have it.

Mr. Bromley: Well, I understand you did not get it, but I started two copies to you at nine o'clock this morning.

The Court: I have it here now.

Mr. Bromley: Excuse me, Your Honor. I started two copies to them at nine o'clock this morning.

The Court: Well, I have it here now.

Of course, as you read the life of Lincoln, he certainly took the position that there is a reservoir of inherent powers in the Presidency because he drew upon that reservoir time and time again.

Mr. Bromley: He did. He stretched its very sides. There is no doubt about it, and I think it is very interesting now to look back on that, but he did. There can be no doubt about it.

The Court: And Theodore Roosevelt threatened to seize the coal mines, I recall reading, at one time when there was a threatened coal strike.

Mr. Bromley: Yes.

The Court: Apparently he felt that there was such [fol. 1555] power.

Mr. Bromley: Yes, my criticism of too much executive power is not confined to the present incumbent alone. I think the fact that Presidents feel sometimes the necessity of this, points to the danger. It is very easy to solve problems in a dictatorial fashion. It is very easy to forget about Congress; it is very easy to say "I alone will do this," but we cannot maintain our existence in safety that

way. Some day we will get a fellow who will go far too far and we will end up with a Hitler.

Well, I have taken too much of Your Honor's time. I thank you.

The Court: Well, I would like to ask you a question before you resume your seat.

These actions are nominally directed against the Secretary of Commerce.

Mr. Bromley: Yes, Your Honor.

The Court: But the Secretary of Commerce is acting pursuant to a directive of the President, a specific directive, or a specific order of the President.

Aren't you indirectly seeking a restraining order against the President though not nominally so? And, if so, does the Court have the power to issue an injunction against the President of the United States?

[fol. 1556] I do not know of any case on record in which a Federal Court, or any other court, has issued an injunction against the President of the United States.

And you recall in the Aaron Burr case, John Marshall indicated a doubt as to whether he could enforce a process against Thomas Jefferson. He indicated that he could issue a subpoena duces tecum against the President, but if the President declined to obey, there was nothing that he, John Marshall, could do about it.

He did not quite use those words, but that was the indication.

Mr. Bromley: Yes, sir, that is so.

The Court: Suppose I issue this restraining order and Mr. Sawyer comes in and says, "I am acting pursuant to the direct orders of the President?"

Mr. Bromley: Well, first, if this were a suit against the United States, then I might be in some difficulty, but the law is perfectly clear, Your Honor, and there is a point in our brief which covers that, that a suit in this precise situation against a Cabinet Officer—and mind you, it is not only against him as Secretary; it is against him as an individual. My caption is "Individually, and as"—

The Court: I would not ask the question that I addressed to you if Mr. Sawyer of his own volition, in the exercise [fol. 1557] of his own discretion, took this action and if you demonstrated that the action was illegal, but he is act

ing pursuant to a directive of the President, and therefore wouldn't an injunction against him be in effect an injunction against the President?

Mr. Bromley: I think not, sir. I think not. I don't think the President is an indispensable party to this action.

The Court: I don't say that he is, as a matter of form, but I mean in essence and in spirit wouldn't an injunction against him be an injunction against the President?

Mr. Bromley: I do not think it would, sir, under the law.

I approach the problem this way: It certainly is not a suit against the United States.

The Court: No, it is not. I don't think you have to labor that point.

Mr. Bromley: And I do not think it is a suit against the President, although, if it were, I think it would lie. I think a suit against the President under this kind of a situation would lie.

The Court: Do you think that the Court has authority to issue an injunction against the President?

Mr. Bromley: No, I have not at the moment.

[fol. 1558] The Court: I say, is it your view that the Court has that authority?

Mr. Bromley: Yes, sir.

The Court: I don't know of any case in which that has been done.

Mr. Bromley: I do not at the moment either. But we considered that before we drew our pleadings and came to the conclusion that Your Honor, as a District Judge, possessed that authority. But I do not think it, sir, any more necessary that the action be thought of as an action against the President than an action against a local postmaster to enjoin him from carrying out an order of the Postmaster General can be said to be an action against the Postmaster General.

This Court can give effective relief, if Your Honor pleases, not only against Mr. Sawyer, but against the man Mr. Sawyer sends out to our plant. You don't need Mr. Sawyer to give us protection as to a specific plant. And I submit that this Court does not need to resolve the question whether it could issue a direct order against the President, since it is clear that it can issue such an order against the President's designee.

But I should be glad to go back to the office and see what I can find. *

Mr. Wilson: If Your Honor please, may I make an answer [fol. 1559] to Your Honor's inquiry?

The Court: Yes, indeed.

Mr. Wilson: Supplementing Mr. Bromley's response.

I think when you go back to Mississippi against Johnson at the time of the attempted enforcement of the Reconstruction Acts, in which the Supreme Court had occasion to consider that doctrine, and when you try to analogize the situation which Your Honor has posed, with the one which arises when the Court has the problem of whether a suit against a Cabinet Officer is a suit against the United States, you find an entirely different situation.

We know that frequently when Cabinet Officers have been sued and the United States has not been sued, as such, that this Court and other courts including the Supreme Court has determined that the action was an action against the United States.

That is based upon certain considerations that I need not take the time to outline here.

Certainly they are not the same considerations which are indulged in on the proposition which Your Honor has now posed, because the question of the power to sue the President of the United States flows from the doctrine of the separation of powers, as Your Honor knows, and the courts over the years have seized every possible kind of excuse [fol. 1560] to avoid the difficulty of that problem when the President was not named as a defendant.

Now, that is the test of the situation. In other words, I don't believe there is a case—there certainly is no case which I have ever been able to read or have ever seen, where the court would indulge in the same kind of reasoning that you do when you are considering this problem of a suit against the United States.

In other words, in this situation the question is who is being sued; who is to be enjoined. It is a matter of sheer personality.

The Court: Well, there is no doubt about the technical situation, but, actually, if an injunction is granted its effect would be to nullify a personal act of the President of the United States; would it not?

Mr. Wilson: Yes, but that is not the test of the problem. The test is the question of the exercise of the judicial power against the executive.

Now, it does not go any further than the office of the Chief Executive. Your Honor knows that the Cabinet Officers are agents of the Executive.

The Court: I would be very glad to have an answer to this question, Mr. Wilson:

Suppose the President personally was exceeding his authority, could this Court issue an injunction against the [fol. 1561] President personally?

Mr. Wilson: I would have considerable doubt about it, sir.

The Court: That is my feeling also.

Mr. Wilson: But if I answered any differently from Mr. Bromley, we are in accord on the result because we don't—

The Court: Your point is that you can sue a subordinate?

Mr. Wilson: Certainly.

The Court: Even though you may not sue the chief?

Mr. Wilson: I read again last night somewhere between midnight and breakfast this morning, Mississippi against Johnson, because I anticipated, with Your Honor's keenness of mind, that this problem would arise. And I say you can read Mississippi against Johnson from the first word to the last and you come out with only one impression, and that is that it is a problem of the personal action against the person of the Chief Executive himself, and that is the only way in which this question of the separation of powers arises in this picture.

As I started to say to Your Honor a few moments ago, every Cabinet Officer is a member of the Executive Branch of the Government, and every Cabinet Officer is an agent of the President, and yet no one would think for one moment [fol. 1562] that in an ordinary situation a suit against a Cabinet Officer was a suit against the President of the United States.

Now, the only other thing I wanted to add is this: The President in this case allowed for a margin of discretion on the part of Secretary Sawyer. In other words, Mr. Sawyer did not stop by saying, in his order No. 1, "By virtue of

the authority vested in me by the President of the United States, I seize "so and so."

As I said to Your Honor in my argument, he added additional words of high significance in this situation—"I deem it necessary"; not the President of the United States speaking, Your Honor. This is the respondent Charles Sawyer.

Charles Sawyer says:

"I, Charles Sawyer, deem it necessary in the interest of national defense that possession be taken of the plants. I, therefore, take possession."

He has gone on record here as having made the final and fatal decision. He is, therefore, amenable to the processes of this Court under these circumstances.

The Court: I will hear from the Government.

ARGUMENT ON BEHALF OF THE DEFENDANT

Mr. Baldridge: May it please the Court, the complainants are here seeking the extraordinary remedy of a re-
[fol. 1563] straining order on the following grounds:

One, that there is no power in the President to seize the steel plants.

Two, on the ground of irreparable injury.

Three, that the Government has an adequate remedy by existing statute.

And, four, that no one would be injured by a few days' delay anyhow.

Since, in order to secure this extraordinary remedy it is necessary for the complainants to show irreparable injury, we submit in the absence of irreparable injury and in the absence of an adequate remedy at law, they are not entitled to the order, and I should like to address myself first, briefly, to the question as to whether they have made out a case for irreparable injury.

They have argued largely that the seizure deprives them of their property and their possession and right to control in the ordinary course of business;

That they are deprived of the right to negotiate and to bargain collectively;

That it exposes the steel companies to the possibility

that they will have forced upon them a labor contract embodying the recommendation of the Wage Stabilization Board;

That it will destroy their relations with customers and [fol. 1564] interfere with existing contracts and injure their good will;

That it will endanger their trademarks and that it amounts to a usurpation as well as an impairment of the rights of the stockholders.

I submit, Your Honor, that the clear language of the executive order issued by the President, the operating order No. 1 issued by the Secretary of Commerce, who is the delegate, the direct delegatee of the President, as well as the telegraphic notice issued by the Secretary of Commerce to each of the steel plants, indicate that none of these alleged injuries are possible.

And I call your attention to the executive order, paragraph 3, which provides that the Secretary of Commerce shall recognize the rights of the workers to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining, adjustment of grievances, or other mutual aid or protection.

Now, there is nothing in that paragraph, Your Honor, that deprives these concerns, or the unions, of an opportunity to bargain collectively.

The Court: What do you say about the point made by counsel for the plaintiffs—that what they really fear is the possibility—or they call it the probability—that the Government, during the period of Government operation, may enter into labor contracts with which the companies will be saddled after they resume possession, and which they will consider highly unfavorable to them?

What do you say about that point?

Mr. Baldrige: Well, first I think, Your Honor, they have had adequate—

The Court: As I see it, that is the only real so-called irreparable damage that they claim.

Anyway, it is the only one they have emphasized.

Mr. Baldrige: Based on past histories of seizures of this type, research discloses that in only one instance has

the Government never negotiated a wage contract with the union in a seized plant.

That was the Krug-Lewis agreement, I believe, in 1946.

In all other seizures--and there was one seizure in Lincoln's time of this type, under the general plenary powers of the President, and there was one in Woodrow Wilson's time, and there were twelve in Franklin Roosevelt's time--and in none except the 1946 Krug-Lewis agreement was there any effort nor any agreement consummated in respect to terms and conditions of employment as between the Government, who was operating the plants technically, [fol. 1566] and the unions.

I submit, Your Honor, that paragraph 3 of the executive order not only permits, but it was deliberately designed to permit, as well as encourage, continued collective bargaining as between the steel plants on the one hand and the unions on the other.

The President, in his remarks last night outlining the reasons for the seizure of the plants, indicated that both sides had been called to Washington today for the purposes of bargaining as between themselves in an attempt to settle this very serious wage dispute.

Now, as to their argument that the management would be interfered with and ousted, and dispossessed of the possession of their plants, I call your attention to paragraph 4 of the executive order, which reads:

"... The managements of the plants, facilities, and other properties possession of which is taken pursuant to this order shall continue their functions, including the collection and disbursement of funds in the usual and ordinary course of business in the names of their respective companies and by means of any instrumentalities used by such companies."

Likewise, in paragraph 5 of the executive order it provides that existing rights and obligations of such companies [fol. 1567] shall remain in full force and effect, and there may be made, in due course, payments of dividends of stock and of principal, interest, sinking funds, and all other distributions upon bonds, debentures, and other obligations, and expenditures, shall continue to be made in the ordinary corporate fashion.

Then in the delegatee's order No. 1, which is the order of the Secretary of Commerce, there is provided that the executive officers of the company shall be designated as the operating managers for the United States, and that they are to continue the normal operations of the plant the same as though there was no Government seizure of any kind.

That is, as to the day-to-day operations of the plants, keeping of accounts, disbursements, and so forth.

I submit, Your Honor, that based upon the specific provisions of the executive order, the operating order No. 1 of the Secretary of Commerce, the President's delegatee, as well as the telegraphic notice, there is no showing of irreparable injury based upon the grounds advanced by complainants.

The management is to continue to perform the usual functions of management.

We submit, second, that the request for a temporary restraining order is untimely, not only because there has been no irreparable injury shown, or threatened, but because these complainants have an adequate remedy at law.

This, I submit—and it is our position—is a legal taking under the inherent executive powers of the President and subject to just compensation under the Fifth Amendment to the Constitution in the event damage is suffered and proved by them.

The Court: Well, are you going to institute eminent domain proceedings?

Mr. Baldridge: We had not contemplated that, Your Honor.

The Court: Well, where there is a taking by eminent domain, isn't there an obligation on the part of the Government to institute eminent domain proceedings?

Mr. Baldridge: That is correct. We do not anticipate going that route.

The Court: Beg pardon?

Mr. Baldridge: We do not anticipate going that route.

The Court: In other words, you would remit these plaintiffs to the Court of Claims for action for damages?

Mr. Baldridge: That is correct.

The Court: Of course, the Court of Claims does have [fol. 1569] jurisdiction to reward damages for taking by eminent domain.

Mr. Baldridge: That is correct.

The Court: Where the Government fails to institute eminent domain proceedings.

Well, do you concede, then, that this is a taking by eminent domain?

Mr. Baldridge: Well, we say that this is a legal seizure. That is subject to just compensation under the Fifth Amendment in the event the parties can make a case.

The Court: I know, but I think I would like to get it reasonably precise so there will be no ambiguity.

Do you concede that an action for just compensation lies in the Court of Claims for any effects of this seizure?

Mr. Baldridge: That is correct. We do concede, and we would like to make that clear.

The Court: Now, if the seizure is illegal, would you concede or deny that there is a remedy for damages against the United States under the Federal Tort Claims Act?

Mr. Baldridge: We think there would be.

The Court: Do you concede that too?

Mr. Baldridge: Yes.

[fol. 1570] Now, a word, Your Honor, as to the power of the President to seize under the inherent executive powers. It is our position that this is not the proper time to present that problem. That is a legal problem on the merits and it is going to require more time.

The Court: No, I think it is a proper time. I think that is one of the matters that the Court weighs in determining whether or not to grant a restraining order.

Mr. Baldridge: Well, if there is no irreparable—

The Court: I do not think you should just decline to argue that matter.

Mr. Baldridge: Well, I would like to submit a brief on it, Your Honor.

The Court: No, I am going to decide the matter at the end of this argument. This is an application for a restraining order. I think the application would be defeated if I reserved decision and decided the matter ten days hence.

I think I have to decide the matter today.

If this was a final hearing, that would be different proposition.

Mr. Baldridge: I call Your Honor's attention to Article 2 of the Constitution which provides that the executive power shall be vested in the President of the United States; [fol. 1571] that the President shall affirm that he will faithfully execute the office and will attest to the best of his ability, preserve, protect and defend the Constitution of the United States; that he shall be Commander-in-Chief of the Army and Navy of the United States; that he shall be the sole organ of the nation in its external relations, and that he shall take care that the laws be faithfully executed.

We submit that these provisions of the Constitution are sufficiently broad that the executive powers vested in the President of the United States is, in itself, a grant to the President of all executive power, not specifically divested by other provisions of the Constitution.

The Court: What is meant by "executive powers," Mr. Baldridge? Isn't it the power to execute statutes?

Mr. Baldridge: Well, among other things it is the power to protect the country in times of national emergency by whatever means seem appropriate to achieve the end.

The Court: Well, how far would you carry that?

Mr. Baldridge: Well, we don't think we have carried it too far in this particular instance, Your Honor. I don't know as I can discuss it—

The Court: Now, you say that this is really a taking by eminent domain. Of course, the Government has the power [fol. 1572] of eminent domain; the Supreme Court has held that time and time again, but what perturbs me a little bit when you assert this to be a seizure by eminent domain, it was my understanding that eminent domain was a power that has to be exercised pursuant to an Act of Congress.

Mr. Baldridge: We say it is a legal taking, Your Honor, subject to just compensation under the Fifth Amendment. We don't go so far as to take the position that it is a taking under the eminent domain powers.

The Court: Well, what kind of a legal taking if not a taking by eminent domain?

Mr. Baldridge: I am not prepared to answer that.

The Court: Very well.

Mr. Baldridge: Now, the complainants have argued, Your Honor, that the Government had an adequate remedy by statute; that they did not have to move under the plenary powers which reside in the executive.

We submit that that is a matter that cannot be inquired into.

The Court: I don't think you need to argue that. It is not for this Court to say which of several courses the President should have pursued. That is for the President. If he has legal power to pursue the course that the President has pursued, the mere fact that he had the choice of [fol. 1573] some other course is nothing for the Court to pass on.

Mr. Baldridge: We think that is correct, too, Your Honor. I should like to say a word about the unclean hands point that Your Honor brought up this morning.

We understand—we have not had a full report, but a number of plants—

The Court: Beg pardon?

Mr. Baldridge: A number of the plants have shut down in spite of the executive order.

What that amounts to is that the complainants are in here on an application for a temporary restraining order, seeking this Court's assistance in keeping the plants closed in order to assist them in the labor dispute.

The Court: What do you say about Mr. Patton's statement that the reason they did not reopen the plants this morning was because they had to shut down the furnaces in preparation for the strike, and that it takes time to start the furnaces going again?

In other words, I gathered that Mr. Patton's point was that there was no contemplation of defiance of the President in failing to reopen the plants this morning, but it was merely due to the physical conditions.

[fol. 1574] What do you say about that?

Mr. Baldridge: If that be true, Your Honor, of course that is a practical consideration that management has to meet.

I understand that when a plant is shut down and the fires are banked, that it takes quite some time to get the plant into operating condition, that is, its normal operating

condition. I don't know just the time. I have heard it variously estimated from up to two to three weeks. Just how far the fires are banked in furnaces of the various companies, we do not have that information.

Mr. Bromley: I want to say for Bethlehem that we are not closing any plants.

Mr. Gall: The same is true for Republic and Youngstown.

Mr. Patton: I found out just over the noon hour that our company has called its employees back in the normal course.

As I said, first we have to get some pig iron before the employees in the open hearths could come in. Then the employees in the open hearths come in, and before we can start these mills, they have to have steel to roll in the mills. We have been shut down now, and we cannot do it all in a minute, to reopen.

[fol. 1575] The Court: Well, under those circumstances I don't think failure to reopen the mill this morning should be considered as any circumstance adverse to the plaintiffs on this application.

Mr. Baldridge: I should like to address myself briefly to a statement of one of counsel this morning, that this seizure is a coercive effort to force the companies to negotiate on the basis of the recommendations of the Wage Stabilization Board.

I think I need to go no further than to point out the reasons stated by the President last night in his radio address to the nation pointing out the reasons for the seizure.

We are in a period of national emergency, in a defense production situation, and it is necessary that production be constant and continuous as well as high in volume and quality, and that any interruption of that production effort would cause serious interference with our preparations for national defense.

And just one more word. Your Honor, as to the President's power to seize: I think in the last analysis it is fair to say that magnitude of the emergency itself is sufficient to create the power to seize under these circumstances.

The Court: I think Chief Justice Hughes said in one of [fol. 1576] his opinions that emergencies do not create power. They may give an occasion for the exercise of power that has been dormant, but they do not create power.

Mr. Baldridge: Well, under our Constitutional system, Your Honor, it seems to me that there is enough residual power in the executive to meet an emergency situation of this type when it comes up.

The Court: I think that whatever decision I reach, Mr. Baldridge, I shall not adopt the view that there is anyone in this Government whose power is unlimited, as you seem to indicate.

Mr. Baldridge: I was not indicating that, Your Honor. I just said I thought that the present emergency presented a sufficiently serious situation that it could be met by the residual powers that reside in the executive.

The Court: Do you rely on the President's powers as Commander-in-Chief? You have not mentioned them at all, except in reading Article 2.

You seem to place more virtue in the first sentence of Article 2 than in the laws constituting him Commander-in-Chief.

Mr. Baldridge: Based upon all the powers that he has as an executive, including the powers that he has by virtue of his position as Commander-in-Chief.

[fol. 1577] Mr. Bromley: I have not heard, Your Honor, any answer to my inquiry as to whether Mr. Baldridge could tell us what Mr. Sawyer was going to do about increasing wages.

The Court: Perhaps he doesn't know.

Mr. Baldridge: I think I mentioned, Your Honor, that the President mentioned over the radio last night that he had asked both sides to come down and resume negotiations. Further than that, I do not know what the situation is as of now.

Mr. Bromley: Well, I really press for some statement that our reopening of the plant—

The Court: Perhaps Mr. Baldridge is not in a position to make any statement as to what his client proposes to do.

After all, Mr. Baldridge only represents him as his legal adviser, and as his counsel, of course.

Mr. Bromley: Yes, but he has been operating here with a pretty free hand about modifying and amending the Tort Claims Act. I am not sure what good that concession will do me, by the way, when I get in the Court of Claims. I hope it will be effective. I really don't think it will be.

The Court: I must say, Mr. Bromley, I don't agree with the construction you place on the jurisdictional cause of [fol. 1578] the Act. I think that jurisdictional cause is intended to create a right of action against the United States for the damages for a tort committed by any officer or employee of the Government within the scope of his Government activities, irrespective of whether the act is illegal or not. Even if it was not illegal, then of course there would not be a cause of action. Cause of action arises only for an illegal act.

It is just like if a driver of a department store truck is guilty of negligence, he is not authorized to be negligent, but nevertheless if he is acting within the scope of his employment, his employer is liable.

Mr. Bromley: Yes, but it is the exception, I submit to Your Honor. A man acting with due care, but under some governmental direction, whether valid or invalid—

The Court: It does not say "direction." It says under a statute or regulation.

Mr. Bromley: Regulation, yes.

The Court: I don't say a directive to do a particular thing is a regulation. A regulation is one of general character.

Mr. Bromley: And also I don't think Mr. Baldrige's concession about condemnation is binding on the Government, or means anything to us plaintiffs.

[fol. 1579] The Court: Well, there is a principle of law that the Government cannot be estopped by concessions made by its agents, but, however, Mr. Baldrige is a sufficiently high officer of the Department of Justice that I am sure the Department of Justice will not repudiate his concessions.

Mr. Baldrige: I think I indicated, Your Honor, that just compensation would be paid if they can make a case.

The Court: Well, of course, but the plaintiff would have to prove damages.

Anyone who seeks compensation for a legal taking of property must prove damages; otherwise he recovers a nominal damage of one dollar.

But you admit there is a cause of action in the Court of Claims for damages, if damages can be shown?

Mr. Baldridge: That is correct.

Mr. Bromley: I do call to Your Honor's attention again that I think Your Honor should have, before Your Honor decides this motion, some indication from the Government as to whether they will maintain the status quo if Your Honor should deny our motion.

The Court: Status quo as to what?

Mr. Bromley: As to wages.

If Your Honor fails to give us this restraining order and [fol. 1580] they walk out of here and sign a contract with the union, irreparable damage is irreparable, and is done, and I think they ought to give us an assurance here that they will not do that until we could decide this very important fundamental question of law to which you have adverted and which we have been discussing here.

The Court: Would you like to answer that?

Mr. Baldridge: I cannot give assurance as to that, Your Honor. As of this moment I do not know, but I do want to point out that if this temporary restraining order is granted, it will be an order, in effect, to strike, because as of the moment there is no strike. When the seizure order went into effect at midnight last night, the president of the CIO announced that the strike was off and the union would go back to work.

Now, if a temporary restraining order is entered now, that order will have the effect of causing a strike and, as a matter of fact, it would be legalizing a strike by court order.

The Court: No, now, just a moment. You are not suggesting that if this Court issues a restraining order, there will be a strike?

Mr. Baldridge: If a restraining order is issued, then the situation remains, I suppose, in status quo prior to seizure [fol. 1581] action, and what the means is that you have notice that the union is going out on a strike as of a certain time.

The Court: You mean, in other words, that if I issued a restraining order, the status will revert to what it was before the President's seizure order took effect?

Mr. Baldridge: Yes.

The Court: When was that, 12 o'clock midnight?

Mr. Baldridge: 12:01, I believe.

The Court: I see your point.

REPLY ARGUMENT ON BEHALF OF YOUNGSTOWN SHEET AND TUBE

Mr. Wilson: If Your Honor please, Your Honor has been so very kind and I have talked so much, as my voice indicates, that I don't want to try your patience even as large as I know that it is, but I cannot refrain, in closing, in a couple of minutes from referring to Mr. Baldridge's comment in dealing with this question of irreparable damage, that the President in his remarks last night in effect called the parties together to try to straighten this out.

Now, I am not concerned about Mr. Baldridge's arguments. I don't think—

The Court: You have taken a good deal of time, Mr. Wilson. What is your point?

Mr. Wilson: I am coming right to the point. I am [fol. 1582] concerned with what Your Honor said and I want to answer it, and that question is "We seem to have emphasized mostly the matter of the probability of this labor contract."

I told Your Honor this morning, and of course you remember it, that the problem is not only a problem of wages and the fringe benefits, but it is the imposition of a union shop upon the steel industry, a transformation not only treasury-wise but policy-wise and operational-wise of the whole relationship.

The Court: Oh, well, it is not for me as a Judge to decide whether a union shop is wise or unwise.

Mr. Wilson: Of course it is not.

The Court: And I shall not do so.

Mr. Wilson: And that is the reason that it is evidence of irreparable injury in this situation.

Now, let me close with this thought, because we are men and not boys; we are realistic; we find out that two

and two make four, and here is how they make four in this situation:

The President, in paragraph 3 of his executive order, said that the Secretary of Commerce shall determine and prescribe terms and conditions of employment: "Shall determine." Now, last night this is what the President [fol. 1583] said, and I have the press release from the White House which cannot be disputed:

"There has been a lot of propaganda to the effect that the recommendations of the Wage Board were too high; that they would touch off a new round of wage increases——"

The Court: Now, gentlemen, it so happens that I did not hear the President's speech on the air last night. I did not know this matter was coming before me, and I did not know it until a few minutes before ten o'clock this morning, but I think it just as well that I did not hear the President because, if I heard it, you might feel that hearing that speech might have influenced me one way or the other.

Now, then, I don't think you should read it to me either.

Mr. Wilson: I want to say this, if the Court please: I want to smile, too, but I am tired, and so is Your Honor, but let me make this observation in closing:

In the first place, if there is any question about the speech being in the record, I would like to be sworn and identify the speech in my hand as the one that I heard the President render over the radio.

The Court: I don't think that it is relevant to this proceeding before me.

Mr. Wilson: It is relevant, if the Court please, if I [fol. 1584] may try your patience one last second.

The Court: You are not trying my patience. The Court always enjoys hearing you, Mr. Wilson.

Mr. Wilson: Thank you, Your Honor. Thank you very much.

I want to refute the statement of Mr. Baldrige that the President has some kind of an open mind about this situation. The President says:

"There has been a lot of propaganda. The facts are to the contrary. When you look into the matter,

you find that the Wage Board's recommendations were fair and reasonable; they were entirely consistent with what has been allowed in other industries over the past 18 months; they are in accord with sound stabilization policies."

And so on down there, and the effect of it is, when you put the two and two together, the President's declaration that the Wage Board's findings are fair and his directive to Mr. Sawyer straightened out this question of labor relations, the two add up to an inevitable result of a labor contract which will impose irreparable damages upon us.

The failure of Mr. Baldrige to be able to say that that [fol. 1585] will not occur is in and of itself all that Your Honor needs to grant the temporary injunction in this case.

The Court: We will take a short recess at this time.

(There was a brief informal recess, at the conclusion of which the proceedings were resumed as follows:)

OPINION

The Court (Holtzoff, J.): On April 8, 1952, the President of the United States issued an Executive Order entitled "Directing the Secretary of Commerce to take possession and operate the plants and facilities of certain steel companies."

The principal position of this Executive Order reads as follows:

"The Secretary of Commerce is hereby authorized and directed to take possession of all or such of the plants, facilities and other property of the companies named in the list attached hereto, or any part thereof, as he may deem necessary in the interest of national defense, and to operate or to arrange for the operation thereof, and to do all things necessary for or incidental to such operation."

Acting pursuant to this Executive Order, the Secretary of Commerce took possession of the plants, facilities, and [fol. 1586] other properties of certain companies engaged in the manufacture of steel. Among them are the three

companies who are plaintiffs in the three actions now before the Court.

The order of seizure was accompanied by a lengthy telegram addressed to the president of each company, whereby the president was being called upon, as a loyal and patriotic citizen, to serve as and was appointed operating manager for the United States of the properties of the company.

The president of the company, as such operating manager, was authorized and directed to continue operations for the United States. In other words, the management of the company was in each instance left in charge of the operation of the plant, subject to Government control.

Three of the companies whose plants were so seized—Bethlehem Steel Company, Republic Steel Corporation, and Youngstown Sheet and Tube Company—have brought actions for an injunction and declaratory judgment against Charles Sawyer, individually, and as Secretary of Commerce. In each instance, an application for a temporary restraining order has been made to restrain the defendant from continuing possession of the plant, and in any other way from acting under the order of seizure.

[fol. 1587] An application for a temporary restraining order involves the invocation of a drastic remedy which a court of equity ordinarily does not grant, unless a very strong showing is made for the necessity and the desirability of such action. The application is, of necessity, addressed to the discretion of the Court. It is not sufficient to show that the action sought to be enjoined is illegal. It is, in addition, essential to make a showing that the drastic remedy of an injunction is needed in order to protect the plaintiff's rights.

In arriving at its decision, the Court must arrive at a balance of equities, and consider not only the alleged legality or illegality of the action taken, but also other circumstances that will appeal to the discretion of the Court.

There are several matters that the Court must weigh in this instance. Although, nominally, and technically, the injunction, if granted, would run solely against the defendant, Sawyer, actually and in essence it would be an injunction against the President of the United States, be-

cause it would have the effect of nullifying and stopping the carrying out of the President's Executive Order for the seizure of the plants. It is very doubtful, to say the least, [fol. 1588] whether a Federal Court has authority to issue an injunction against the President of the United States, in person. (The State of Mississippi v. Johnson, 41 Wall. 475.) In that case, Chief Justice Chase made the following statement, at page 500:

"The Congress is the legislative department of the Government. The President is the executive department. Neither can be restrained in its action by the judicial department, though the acts of both when performed are in proper cases subject to its cognizance."

The Court, it seems to me, should not do by indirection what it could not do directly, irrespective of whether the Court has the power so to do. It would seem to me that this is a consideration that should affect the exercise of the Court's discretion.

Another circumstance that must be considered is whether the plaintiffs will sustain irreparable damage if a temporary restraining order were denied. The Court heard counsel at length on this point, because that is a matter that seemed to the Court to be of vital importance. The situation, as it presents itself at this stage, is that the president of each company, and his managerial staff, remain in control and are named as operating agents for the United [fol. 1589] States. They have not been dispossessed or displaced. They are still in possession and will continue to conduct the company's operations.

True, plaintiff's fear that other drastic steps may be taken which would displace the management or which would supersede its control over labor relations. It seems to the Court that these possibilities are not sufficient to constitute a showing of irreparable damage. If these possibilities arise, applications for restraining orders, if they are proper and well-founded, may be renewed and considered.

On the other hand, to issue a restraining order against Mr. Sawyer, and in effect nullify an order of the President of the United States, promulgated by him to meet a nation-

wide emergency problem is something that the Court should not do, unless there is some very vital reason for the Court stepping in.

The Court feels that the balance of the equities is in favor of the defendant, so far as the present application is concerned. This conclusion is fortified by the concessions of Government counsel, to the effect that, in any event, the plaintiffs have an adequate remedy in suits for damages. Government counsel concedes that if, as they say it is, the seizure is lawful and a legal taking of property, a suit for [fols. 1590-1591] just compensation will lie in the Court of Claims against the United States.

On the other hand, Government counsel further concedes that if the seizure is illegal, an action for damages lies against the United States under the Federal Tort Claims Act. The Court is of the opinion that such actions would lie.

The fact that the plaintiffs have adequate remedies by way of actions for damages, and the considerations already stated, lead to the conclusion that the balance of equities requires a denial of a temporary restraining order. The motion for a temporary restraining order is denied.

(The instant matter was concluded.)

[fol. 1592] [Stamp:] Filed May 5, 1952. Harry M. Hull,
Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

Civil Action No. 1550-52

THE YOUNGSTOWN SHEET AND TUBE COMPANY, and THE
YOUNGSTOWN METAL PRODUCTS COMPANY, Plaintiffs,

v.

CHARLES SAWYER, Defendant

Civil Action No. 1539-52

REPUBLIC STEEL CORPORATION, Plaintiff,

v.

CHARLES SAWYER, Defendant

Civil Action No. 1549-52

BETHLEHEM STEEL COMPANY, et al., Plaintiffs,

v.

CHARLES SAWYER, Individually and as Secretary of Com-
merce, Defendant

Washington, D. C.,
Thursday, April 10, 1952.

[fol. 1593] The above-entitled actions came on for hearing
on an oral motion to advance for trial before the Hon.
Walter M. Bastian, United States District Judge, at 12:00
noon.

APPEARANCES

On behalf of Plaintiffs The Youngstown Sheet and Tube
Company and The Youngstown Metal Products Company:
John C. Gall, Esq., and John J. Wilson, Esq.

On behalf of Plaintiff Republic Steel Corporation:
John C. Gall, Esq., Edmund L. Jones, Esq., Howard Boyd,
Esq., and Thomas F. Patton, Esq.

On behalf of Plaintiff Bethlehem Steel Company, et al.
E. Fontaine Broun, Esq., and Bruce Bromley, Esq.

On behalf of Defendant: Homes Baldridge, Assistant At-
torney General, and Marvin Taylor, Esq.

[fol. 1594]

PROCEEDINGS

Mr. Jones: Your Honor please, we are here this morning in the case of Republic Steel v. Charles Sawyer, which was filed yesterday for an injunction against Mr. Sawyer in connection with the seizure of the steel plants. I speak as one of the counsel for Republic Steel Company, and there are two cases that are on here this morning, the Sheet and Tube case and the Bethlehem case.

Your Honor probably knows yesterday there was argued before Judge Holtzoff a motion for a temporary restraining order, which the Judge denied. In view of the great seriousness of this case and the necessity of a very prompt determination as to the alleged right of the Government or of Mr. Sawyer to seize and take over the steel plants, we feel that it is imperative that this emergency, which I believe is recognized by all, should be promptly decided. We, therefore, are here this morning to ask Your Honor to advance this case for trial and set it down for a very prompt trial on its merits.

The Court: Is there opposition to that?

Mr. Baldridge: Yes, Your Honor.

The Court: Let me say this Court is going to disqualify itself. I have in a very modest portfolio acquired, I might say prior to going on the bench, I don't have much chance to acquire them afterwards, a very small block of stock, [fol. 1595] namely, 30 shares in the Sharon Steel Corporation. While the Sharon Steel Corporation is not a party to either of these suits, its position is similar to those of the other companies which have filed suits and the Court therefore feels it should disqualify himself.

I therefore refer this case to Judge Pine, if he could take it, or otherwise to the Assignment Commissioner for re-assignment.

Mr. Jones: Would Your Honor consent to hear this motion if the Government would raise no question about it?

The Court: I think I would be a little embarrassed, I mean the amount of my stock interest is about \$1,000, I think; I assure you it isn't all I have—

Mr. Jones: It seems that is the minimus, Your Honor please.

The Court: But on the other hand there may be criticism, particularly in a case where there is as much public interest as this one.

Mr. Baldrige: I just want to say, Your Honor, the Government would have no objection whatever to your sitting on it.

The Court: Well, very frankly, maybe I am over-cautious, I am not trying to get out of hearing the case, I assure you gentlemen, it is one that interests me a great deal, but it may be embarrassing.

[fol. 1596] Mr. Wilson: Would Your Honor—excuse my voice.

The Court: I understood you were arguing yesterday, is that it?

Mr. Wilson: The night air is bad for me and I caught cold the night before last.

The Court: Mr. Wilson called me at my house at 11:30 and I saw him at that time; afterwards one of the news services called me up at 2:00 o'clock in the morning and I haven't caught up with my sleep yet.

Mr. Wilson: Would Your Honor ask your clerk, or would Your Honor yourself ask Judge Pine if he could see us if we came there now?

The Court: I will be glad to do it now if you gentlemen will come in my chambers with me. Is there any way you gentlemen could agree on some date to hear it?

Mr. Baldrige: I don't think so, Your Honor, we'd like to go the usual route on the matter with respect to the hearing on the temporary injunction and the final injunction.

The Court: Well, if you gentlemen will—I want to say, first, I appreciate the Government's attitude and my unwillingness to go ahead, it does seem silly, probably will to outsiders, because of an interest such as that, that I should disqualify myself but, like Caesar's wife, I guess we have got to be above suspicion.

[fol. 1597] If you gentlemen will come in my chambers,

I will call Judge Pine and see if he will hear it. If not, I will see that you do get a hearing before some other Judge.

(Whereupon, the foregoing proceedings were concluded.)

[fols. 1202-1203] [File endorsement omitted]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

Civil Action No. 1539-52

REPUBLIC STEEL CORPORATION, a New Jersey Corporation,
Plaintiff,

vs.

CHARLES SAWYER, Westchester Apartments, Washington,
D. C., Defendant

Civil Action No. 1549-52

BETHLEHEM STEEL COMPANY, et al., Plaintiffs,

vs.

CHARLES SAWYER, Individually and as Secretary of Com-
merce of the United States of America, Washington,
D. C., Defendant

Civil Action No. 1550-52

THE YOUNGSTOWN SHEET AND TUBE COMPANY, a Body Cor-
porate, Youngstown, Ohio; The Youngstown Metal
Products Company, a Body Corporate, Youngstown,
Ohio, Plaintiffs,

vs.

CHARLES SAWYER, Westchester Apartments, Washington,
D. C., Defendant

Civil Action No. 1581-52

JONES & LAUGHLIN STEEL CORPORATION, Plaintiff,

vs.

CHARLES SAWYER, Westchester Apartments, Washington,
D. C., Defendant

[fol. 1204] **Transcript of Proceedings**—Filed April 14, 1952

**MOTION TO ADVANCE THE ABOVE-ENTITLED CAUSES OF ACTION
FOR HEARING AND TO SET THEM DOWN FOR TRIAL ON THE
MERITS AT THE EARLIEST POSSIBLE DATE**

Washington, D. C.,
Thursday, April 10, 1952.

Counsel for the parties in the above-entitled causes of action having, at 12:20 o'clock p. m., on Thursday, April 10, 1952, in the court house in Washington, D. C., appeared in open court

Before Honorable David A. Pine, Judge of the United States District Court for the District of Columbia, there being

PRESENT:

On behalf of Republic Steel Corporation:

Messrs. Hogan and Hartson, by Edmund L. Jones, Esquire, and Howard Boyd, Esquire;

Messrs. Gall, Lane and Howe, by John C. Gall, Esquire;

Messrs. Jones, Day, Cockley and Reavis, by Luther Day, Esquire, and T. F. Patton, Esquire;

On behalf of Bethlehem Steel Company:

Messrs. Cravath, Swaine & Moore, by Bruce Bromley, Esquire, and

Messrs. Wilmer & Broun, by E. Fontaine Broun, Esquire;

[fol. 1205] *On behalf of The Youngstown Sheet and Tube Company and The Youngstown Metal Products Company:*

Messrs. Gall, Lane and Howe, by John C. Gall, Esquire;

John J. Wilson, Esquire; and

J. E. Bennett, Esquire;

On behalf of Jones & Laughlin Steel Corporation:

John C. Bane, Jr., Esquire;

Walter I. McGough, Esquire;

Sturgis Warner;

H. Parker Sharpe, Esquire;

On behalf of the Defendant herein:

Holmes Baldridge, Esquire, Assistant Attorney General of the United States, and Marvin Taylor, Esquire, Assistant Attorney General of the United States.

Thereupon the following proceedings were had:

Proceedings

Mr. Jones: If your Honor please, we appreciate very much your agreeing to hear us on this very short notice.

I appear this morning for the Republic Steel Corporation in the case of Republic Steel vs. Charles Sawyer, which was filed yesterday. There are three other companion cases; the case by the Bethlehem Steel Company, the case by the Youngstown Sheet and Tube Company, and I believe Jones & Laughlin have also filed.

The Court: You say Bethlehem Steel Company?
[fol. 1206] Well, I should make this disclosure to you. My wife is the owner of twenty or twenty-five shares of Bethlehem Steel Company. I don't know what the market is today, but I suppose that is valued at about a thousand dollars.

Now, if you wish to make any point of that, or if any of the other counsel wish to make any point of that, why this is the time to do it.

Mr. Jones: We certainly wish to make no point. Knowing your Honor, I know that wouldn't have the slightest influence on your decision today.

Mr. Baldridge: The Government will be happy to have your Honor sit.

The Court: Very well, if you have no objection after the full disclosure, I will consider whatever this motion is.

Mr. Jones: As your Honor probably knows, yesterday in three of these cases involving the seizure of steel plants, a motion for a preliminary restraining order was argued before Judge Holtzoff and he denied the application.

In view of the great seriousness and importance of this case, which I think the Government fully recognizes, we feel that it is of the utmost importance to the parties involved and to the country at large that this issue of the right of the President to direct the seizure of the property

of these companies be tested out at the earliest possible moment.

We therefore are here this morning to respectfully move [fol. 1207] your Honor to advance this case for hearing and set it down for trial on the merits at the earliest possible date.

The Court: Now, what was heard yesterday, a motion for a restraining order?

Mr. Jones: A motion for a temporary restraining order without notice.

The Court: You are not moving for a temporary injunction?

Mr. Jones: No, sir; but at the moment we want the matter finally decided on the merits.

The Court: Take evidence and hear the whole case?

Mr. Jones: Yes; such evidence as there may be.

The Court: You are appearing for Republic Steel?

Mr. Jones: Republic Steel Corporation. I think that the motion that I just made will be joined in by the other plaintiffs in the other three cases.

Mr. Wilson: Your Honor, I have no voice. I used it up on Judge Holtzoff yesterday.

I appear for the Youngstown Sheet and Tube Company. What Mr. Jones is saying is what I would like to say.

The Court: Who else appears?

Mr. Wilson: Your Honor, may I present Mr. John C. Bane of Pittsburgh, who appears for Jones & Laughlin. He is a member of the Bar of the highest court of Pennsylvania and of the United States Supreme Court. I should like to move his admission for the purpose of this case.

[fol. 1208] The Court: Was he before the Court yesterday?

Mr. Wilson: No, sir; but he is not so far behind that it makes any difference, if your Honor please; if I may be so bold as to suggest it.

The Court: Then he is not pressing for a restraining order?

Mr. Bane: I have not done so as yet.

The Court: You move that he be admitted for the purpose of the case?

Mr. Wilson: Yes.

The Court: That will be done.

Mr. Bane: Jones & Laughlin Steel Corporation got into this rather hurriedly. We filed our complaint late yesterday after the hearing was closed.

I haven't had time yet to discuss with my clients the expedience of making an immediate motion for a restraining order. However, we do join in Mr. Jones' motion, I think if the trial is advanced it will enable us to get along without a separate hearing on a motion for a temporary injunction or for a restraining order, and probably save everybody's time. We can't say yet.

The Court: How long will the trial take?

Mr. Bane: I would have to consult these other gentlemen. I should think not a great deal of time, because the question is primarily one of law.

Mr. Jones: I would say, if your Honor please, not over [fol. 1209] two days.

The Court: How can the case be advanced before an answer is filed?

Mr. Jones: Well, there, it seems to me, if your Honor please, that the Government recognizes the urgency and the importance and the emergency of this matter.

Now, I don't think that the case could be advanced before answer is filed, but I would think that the Government would be—should be and will be—just as anxious as we are to test out the legality of this seizure. There is no reason why the Government, unless it wants to, should take the full twenty days in which to answer. I say "The Government": We are suing Mr. Sawyer in his individual capacity.

Mr. Sawyer, represented by the Department of Justice, can file the answer in a few days. We can then set the trial date. We don't want to press unreasonably, but we think this is a matter of such national importance that it should be promptly disposed of, and this very serious question determined.

Mr. Brown: Your Honor, before you proceed, I should like to say that I am local counsel for the Bethlehem Steel Company and am appearing in Case No. 1549-52. We also join in the same motion in that case that Mr. Jones has made in his.

I also take the opportunity to introduce to your Honor

Mr. Bruce Bromley of the New York Bar, and a member of the Bar of the Supreme Court of the United States. [fol. 1210] I move that he be admitted for the rest of the proceedings.

The Court: I will be glad to have you gentlemen in the case.

Mr. Bromley: Thank you, your Honor.

The Court: Is there anybody else for the plaintiffs?

What does the Government have to say?

Mr. Baldridge: If the Court please, we feel as do the moving parties that this is a most important matter for the courts to decide. Because it is an important and serious matter, as both sides agree, we don't feel that we should be rushed into an early trial. We are willing to go to trial within a reasonable time, but insofar as—

The Court (interposing): Those words are relative. What do you mean by "reasonable time"?

Mr. Baldridge: Under the Rules—

The Court (interposing): And "rushed into it"?

Mr. Baldridge: Under the Rules, your Honor, we have sixty days in which to answer.

The Court: Yes.

Mr. Baldridge: And we would like the case to follow the usual course under the Rules.

Now, they have asked for a temporary injunction as well as for a permanent injunction.

May I ask, is it your idea, sir, to combine these hearings on those two matters?

[fol. 1211] Mr. Jones: Yes. In other words, if we can agree upon the date here for hearing this matter on the merits at a reasonably early date, there would be no necessity for a temporary injunction.

The Court: Well, if as one of the counsel says there is only a question of law, there is no reason why the whole matter shouldn't be decided in one proceeding. But I know of no rule, Mr. Jones, which permits me to advance the date of trial before the case is at issue.

Mr. Jones: I must agree with your Honor on that.

I was hopeful that the Government, because of the great emergency here, would consent to an early trial.

Now, Mr. Baldridge has said "a reasonable time". We would like to know just what he means.

On the sixty-day rule, if your Honor please, we take the position in the Republic Steel Corporation case that we are suing Mr. Sawyer as an individual. I think that Rule 12 is applicable and that he is required to answer within twenty days, not sixty days. This is not a suit against the Government, and it is not a suit against a Government official. It just happens that the man at present designated to take over the steel plants happens to be a Government official. We are not suing him in that capacity. We are suing him in his individual capacity as the man who has seized our property, we say without right.

[fol. 1212] The summonses have been issued for twenty days.

Mr. Baldrige: Mr. Sawyer, your Honor, is an officer of the Government, and in this particular case the delegatee of the Chief Executive. We think under those circumstances that we are entitled to sixty days as provided by the Rules.

• The Court: I am not called upon to decide that on this motion.

If you are unwilling to file an answer forthwith, or within two or three days, I don't see any grounds upon which I can advance the hearing until the answer is filed.

Mr. Jones: May I ask Mr. Baldrige a question?

Mr. Baldrige, would you be willing to have this case set down and get your answer in, and have it disposed of, let's say in the early part of May, or within thirty days?

We don't want to rush you into five days or six days.

Mr. Baldrige: Well, in all frankness, your Honor, this matter is suddenly laid in our laps as counsel for the Government, just as it was with respect to the complainants. It is a matter of tremendous importance. We want to make as thorough a preparation as we can. Until we have studied it a little more, I am not in a position to make any commitment as to an accelerated answer or a trial date other than that provided by the Rules.

Mr. Wilson: I should have thought, your Honor, that the Government of the United States would have known what [fol. 1213] the law was on this subject before the Executive Order was issued; and they wouldn't have to make their research after the injunction suits were filed.

I mean no reflection upon Mr. Sawyer, whom I do not

know, but I certainly do regard the attitude of the Department of Justice here today as one of stalling, and one of not being ready promptly to meet these issues.

The Court: Well, under these circumstances, I know of no rule which permits me to advance the case for hearing in its present posture. That, of course, is without prejudice to the plaintiffs' right to move for a temporary injunction. That is the remedy provided by the Rules.

Mr. Boyd: May I address your Honor on one phase of this?

If the Court please, I would not like to have our motion—I speak on behalf of Republic Steel together with Jones & Laughlin—I would not like to have our motion interpreted necessarily as seeking to shorten the period of time prescribed by law within which the defendant has to answer. The summons as issued in that case upon which I understand return has already been made by the Marshal ascribed to the defendant twenty days in which to answer. Could not the Court under those circumstances set this case down for trial immediately after the expiration of that twenty day period, and could not the Court at this time prescribe a date for trial on the merits twenty days hence? [fol. 1214] The Court: I think the motion is premature.

Mr. Boyd: Does your Honor feel that we have to wait until the answer is in?

The Court: Yes; because I see no way by which I could set a case down for hearing on the merits until the case is at issue.

Mr. Boyd: I anticipate, of course, that the Government would not engage in any dilatory tactics. If they do, in a manner which would necessitate postponement of the trial date, that situation could be dealt with when the Government's pleadings are made known to the Court.

But I thought that at the present posture of the case, your Honor might prescribe a trial date that could be postponed in the event the Government files motions that would make a postponement of the trial date necessary.

Would your Honor do that?

The Court: No; I will not do that.

Is there anything else before me?

Mr. Wilson: Will your Honor indulge us a moment?

The Court: Yes; of course.

The Rules anticipate this by providing a remedy, to-wit, a motion for preliminary injunction.

Mr. Wilson: Yes; thank you, your Honor. We are aware of that.

Thank you very much.

(Thereupon the instant hearing was concluded.).

[fols. 1215-1217] Reporter's Certificate (omitted in printing).

[fol. 1218] [File endorsement omitted]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1550-52

THE YOUNGSTOWN SHEET AND TUBE COMPANY, a body corporate, Youngstown, Ohio; The Youngstown Metal Products Company, a body corporate, Youngstown, Ohio,
Plaintiffs,

vs.

CHARLES SAWYER, Westchester Apartments, Washington,
D. C., Defendant

Civil Action No. 1655-52

THE YOUNGSTOWN SHEET AND TUBE COMPANY, a body corporate, Youngstown, Ohio; The Youngstown Metal Products Company, a body corporate, Youngstown, Ohio,
Plaintiffs,

vs.

CHARLES SAWYER, Westchester Apartments, Washington,
D. C., Defendant

Civil Action No. 1539-52

REPUBLIC STEEL CORPORATION, a New Jersey corporation,
Plaintiff,

vs.

CHARLES SAWYER, Westchester Apartments, Washington,
D. C., Defendant

[fol. 1219] Civil Action No. 1647-52

REPUBLIC STEEL CORPORATION, a New Jersey corporation,
Plaintiff,

vs.

CHARLES SAWYER, Westchester Apartments, Washington,
D. C., Defendant

Civil Action No. 1732-52

E. J. LAVINO & Co., Plaintiff,

vs.

CHARLES SAWYER, Westchester Apartments, Washington,
D. C., Defendant

Civil Action No. 1700-52

ARMCO STEEL CORPORATION, Plaintiff,

vs.

CHARLES SAWYER, Westchester Apartments, Washington,
D. C., Defendant

Civil Action No. 1549-52

BETHLEHEM STEEL COMPANY, et al., Plaintiffs,

vs.

CHARLES SAWYER, individually and as Secretary of Commerce of the United States of America, Washington,
D. C., Defendant

[fol. 1220] Civil Action No. 1381-52

JONES & LAUGHLIN STEEL CORPORATION, Plaintiff,

vs.

CHARLES SAWYER, Westchester Apartments, Washington,
D. C., Defendant.

Civil Action No. 1624-52

UNITED STATES STEEL COMPANY, Plaintiff,

vs.

CHARLES SAWYER, Westchester Apartments, Washington,
D. C., Defendant

Civil Action No. 1625-52

UNITED STATES STEEL COMPANY, Plaintiff,

vs.

CHARLES SAWYER, Westchester Apartments, Washington,
D. C., Defendant

Transcript of Proceedings—Filed April 28, 1952

MOTION FOR PRELIMINARY INJUNCTION

Washington, D. C.,
Thursday, April 24, 1952.

Counsel for the parties in the above-entitled causes of action, having at 10 o'clock a.m., on Thursday, April 24, 1952, in the court house in Washington, D. C., appeared in open court

[fol. 1221] Before Honorable David A. Pine, Judge of the United States District Court for the District of Columbia, There Being

PRESENT:

On behalf of The Youngstown Sheet and Tube Company and The Youngstown Metal Products Company:

John J. Wilson, Esquire, John C. Gall, Esquire, and J. E. Bennett, Esquire;

On behalf of Republic Steel Corporation:

Messrs. Hogan and Hartson, by Edmund L. Jones, Esquire, and Howard Boyd, Esquire;

Messrs. Gall, Lane and Howe, by John C. Gall, Esquire;

Messrs. Jones, Day, Cockley and Reavis, by Luther Day, Esquire, and T. F. Patton, Esquire;

On behalf of E. J. Lavino & Company:

James C. Peacock, Esquire, Randolph W. Childs, Esquire, and Edgar S. McKaig, Esquire;

On behalf of Armco Steel Corporation:

Joseph P. Tumulty, Jr., Esquire, and Charles H. Tuttle, Esquire;

On behalf of Bethlehem Steel Company:

Messrs. Cravath, Swaine & Moore, by Judge Bruce Bromley; and

Messrs. Wilmer & Broun, by E. Fontaine Broun, Esquire;

[fol. 1222] *On behalf of Jones & Laughlin Steel Corporation:*

Messrs. Jones, Day, Cockley and Reavis, by Sturgis Warner, Esquire; and

Messrs. Reed, Smith, Shaw & McClay, by John C. Bane, Jr., Esquire;

On behalf of United States Steel Company:

John Lord O'Brian, Esquire;

Theodore Kiendl, Esquire;

Messrs. Covington & Burling, by Howard C. Westwood, Esquire; and

Roger M. Blough, Esquire;

On behalf of the United States of America:

Holmes Baldridge, Esquire, Assistant Attorney General of the United States, and Marvin Taylor, Esquire, Assistant Attorney General of the United States.

Thereupon the following proceedings were had:

Proceedings

The Court: Before we proceed, gentlemen, I should like to make a few inquiries to ascertain exactly what is before

me, and the names of the counsel in the cases that are before me. The Clerk seems to have some little uncertainty about it, and I should like to have information on the subject.

Now, is the case of Bethlehem Steel Company, et al. vs. Sawyer before me?

Mr. Broun: Yes, your Honor, it is.

[fol. 1223] The Court: What counsel represent it?

Mr. Broun: I am E. Fontaine Broun of the Washington firm of Wilmer & Broun.

Mr. Bruce Bromley of the firm of Crayath, Swaine & Moore of New York City, will speak for the plaintiffs in that case; and I take this opportunity, your Honor, in the interest of saving time now to move his admission for this proceeding.

The Court: The motion is granted.

Judge Bromley: Thank you, sir.

Mr. Broun: Thank you, sir.

The Court: Mr. Bromley may participate.

The Government is represented by whom?

Mr. Baldrige: Mr. Baldrige, Mr. Marvin Taylor and Mr. Slade.

The Court: In all cases?

Mr. Baldrige: That is right.

The Court: I shan't inquire as to the balance of the cases as to whom the Government representatives are.

The United States Steel Company vs. Sawyer, No. 1625-52.

Mr. O'Brian: Justice, the United States Steel Company will be represented on this argument by Mr. Theodore Kiendl of the Bar of New York City; and I respectfully move at this time his admission for purposes of this argument.

The Court: Your motion is granted. You may participate.

Mr. Kiendl: Thank you, sir.

[fol. 1224] The Court: United States Steel vs. Sawyer No. 1624-52.

Mr. O'Brian: The same counsel.

The Court: E. J. Lavino & Co. vs. Sawyer, No. 1732-52.

Mr. Peacock: May it please the Court, this case is a little different from the other cases. It has everything in it that the other cases have, and we abide by the argument to be made for the industry generally. But in addition it has a further factor that we are engaged in the manufacture of

steel. We are not a party to this controversy; and we also submit that we are not within the terms of the order, entirely irrespective of its validity or invalidity.

We are represented by myself, James C. Peacock and Mr. Randolph W. Childs of the Philadelphia Bar. I would like to move his admission for the purposes of making the argument in this case.

The Court: Motion is granted.

Mr. Peacock: I ask that it be sufficient time after the general argument for his presentation of the general features of this case.

The Court: Very well.

You mean during the argument?

Mr. Peacock: Well, we don't want to inject this extra feature into the general industry case. But we do want to be sure to get on today because we want any decision in our case to be premised on both considerations.

[fol. 1225] The Court: Very well.

Jones & Laughlin Steel Corporation vs. Sawyer, No. 1581-52.

Mr. Warner: Jones & Laughlin Steel Corporation is represented by myself, Sturgis Warner, of the firm of Jones, Day, Cockley and Reavis, here in Washington; and by John C. Bane of the Pennsylvania Bar.

The Court: B-a-i-n?

Mr. Warner: B-a-n-e.

If I may I would like to move for the admission of Mr. Bane to argue the case in behalf of Jones & Laughlin.

The Court: The motion is granted.

Armco Steel Corporation vs. Sawyer, No. 1700-52.

Mr. Tumulty: Armco Steel Corporation is represented by myself, Joseph P. Tumulty, Jr., and Mr. Charles H. Tuttle, General Counsel of those companies. Mr. Tuttle will present the case in behalf of the plaintiffs; and I respectfully move his admission for the purpose of this proceeding.

The Court: Very well.

Republic Steel Corporation vs. Sawyer, No. 1539-52.

Mr. Jones: If your Honor please, Republic Steel is represented by myself, Edmund L. Jones, Mr. Howard Boyd, Mr. John C. Gall and Mr. Luther Day of Cleveland. At this time I would like to move Mr. Day's admission for the purpose of argument of this case.

[fol. 1226] The Court: The motion is granted.

Republic Steel Corporation vs. Sawyer, No. 1647-52.

Mr. Jones: The same counsel.

The Court: Youngstown Sheet and Tube Company vs. Sawyer, No. 1550-52.

Mr. Wilson: If your Honor please, Mr. John Gall and myself of the local Bar appear for Youngstown in two cases, No. 1550-52 and No. 1655-52. Mr. J. E. Bennett of Youngstown, General Counsel of the corporation, is here. If he should have occasion to speak I should like to move his admission for the purposes of this case.

The Court: The motion is granted.

Now, in order to avoid repetition so far as that is possible, have counsel made any arrangement among themselves for any particular one of them to present the case generally?

Mr. Bromley: Yes, your Honor; I think we have. We have agreed that Mr. Kiendl representing the United States Steel Company should bear the brunt of the argument and make the initial presentation, and the rest of us I take it will confine our remarks thereafter to matters which are not repetitious.

The Court: Very well.

Is the same true of the Government?

Mr. Baldrige: Yes, your Honor.

The Court: Or rather Mr. Sawyer.

[fol. 1227] Mr. Kiendl: Thank you, your Honor.

Mr. Baldrige: There will be a single argument in reference to all of the cases involved.

The Court: I have had an opportunity overnight to scan—and I use the word “scan” advisedly—the papers filed by the defendant.

I see that there has been placed on my desk this morning numerous files, presumably many briefs. Do counsel think that I would get more assistance in hearing argument if I took an hour now and attempted to go through their papers?

Mr. Kiendl: If your Honor please, speaking for the United States Steel Company, I think it would be to the advantage of the Court if you heard argument first; and it may save the necessity of going through all of these papers.

The Court: Very well; you may proceed.

Oral Presentation on Behalf of United States Steel Company

By Theodore Kiendl, Esquire:

Mr. Kiendl: May it please the Court, this is an application by the United States Steel Company primarily for an injunction restraining what we consider to be the imminent threatened changes in the terms and conditions of employment of a steel employee.

The United States Steel Company today has approximately 200,000 or more such employees. The Secretary of Commerce, the defendant, Mr. Sawyer, was directed by an [fol. 1228] Executive Order to take possession of such steel mills as he deemed in his discretion necessary to be taken to continue the uninterrupted flow of steel into industry; and Mr. Sawyer was directed to operate those steel mills.

Now, at the outset, we desire to call your Honor's attention to what we consider to be an important situation. This is not in any sense the situation which existed before your colleague, Judge Holtzoff, when there was argument before him a few weeks ago on April 9, 1952.

There the situation was this: Three of the steel companies, Youngstown, Republic and Bethlehem, had brought suit against Mr. Sawyer in his official capacity individually, and they joined in a motion for a temporary restraining order. After argument before Judge Holtzoff he decided that there was no irreparable damage shown, but in that connection he stated—in order to be absolutely accurate I would like to read his statement—he stated, and I am reading from Page 84 of the transcript of that record:

“True, plaintiffs fear that other drastic steps may be taken which would displace the management or would supersede its control over labor relations. It seems to the Court that these possibilities are not sufficient to constitute a showing of irreparable damage. If these possibilities arise, applications for a restraining order, if they are proper and well founded, may be renewed [fol. 1229] and considered.”

Judge Holtzoff there did decide that in considering the question of the balance of equities, the balance of conven-

iences, there was not sufficient to enable him to issue the requested temporary restraining order.

Judge Holtzoff there decided—erroneously, we think, and we will try to point out why—that the three steel companies had a perfectly sufficiently adequate remedy at law.

Now in our memorandum, in our Point Five, we discuss that situation, and I would like to briefly call your Honor's attention to some of the decisions that we think hold squarely that where the seizure is illegal there is no possibility of obtaining an adequate remedy at law under the Fifth Amendment of the Constitution for compensation for the taking of private property.

We call attention to the fact that in the Hooe case—if that is the proper way to pronounce it—

The Court: Is that in your Point Five?

Mr. Kiendl: That is in our Point Five. I just want to read one or two sentences from it. It is 218 U. S., and I haven't the pagination on my paper, if your Honor please.

The Court: Your Point Five.

Mr. Kiendl: I haven't it because the brief wasn't finished until very late this morning.

[fol. 1230]. Page 3 of Point Five.

There the Supreme Court said:

"The constitutional prohibition against taking property for public use without just compensation is directed against the Government, and not against individual or public officers proceeding without the authority of legislative enactment. The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication to do so by some act of Congress, is not the act of the Government."

And another case on the next page, your Honor. The United States vs. North American Transportation and Trade Company. The Supreme Court in 1920 said:

"In order that the Government shall be liable, it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power."

And another case in the Supreme Court in 337 U. S., Larson vs. Domestic and Foreign Commerce Corporation, on Page 5.

The Supreme Court there said:

"There is no claim that action constituted an unconstitutional taking. There could not be since the respondent admittedly has a remedy in a suit for breach of contract in the Court of Claims, only if the Administrator's action was within his authority could such a suit be maintained."

Consequently we contend that whereas here the seizure was wholly illegal and wholly unconstitutional, there can be no remedy under that line of cases.

Judge Holtzoff also decided, and we think clearly erroneously, that an action would lie under the Federal Tort Claims Act. In that connection we point out in the same section of the brief at Pages 8 and 9, that the language of the Act and the decisions construing are directly against that proposition.

The Act provides that the United States has given its consent to suits based on the negligence of an employee while acting within the scope of his office or employment. Here there is no negligence on the part of the Secretary of Commerce that is even remotely alleged; and certainly he was not acting within the scope of his office or employment if his acts were illegal and unconstitutional as the plaintiffs here contend.

By a specific provision of that very Court of Claims Act this situation was exempted. The Act is not applicable to any claim based upon an act or omission of the employee of the Government exercising due care in the execution of a statute or regulation, whether or not such statute or regulations be valid.

That has been construed by cases—there are seven of them, I think that we set down on Page 9 of Point V of our brief. That has been construed to include an Executive Order.

Now, if the decision in those cases, Old King Coal Company, Jones, Lauterbach, Toledo, Boyce, and McCrary are correct, then the holding of Judge Holtzoff on a short and preliminary argument, we think, is demonstrably in error.

Now, passing from the situation before Judge Holtzoff to the situation that now confronts your Honor, it is the contention of the United States Steel Company that the situation has been drastically changed. And I think the best way to demonstrate to your Honor that that situation has drastically changed is to point out the important events that transpired in connection with this issue chronologically.

Now much has been said in the Government affidavit and will probably be said by counsel for the Government about the fact that here was an imminent threat to our national safety and our national defense.

I want to point out to your Honor first that we will go back to the year 1950, December 16, when, as your Honor [fol. 1233] will recall, there was a Presidential Proclamation on the existence of a national emergency, and this situation was then somewhat foreseen.

But I will skip from that declaration of the national emergency down to the year 1951 and to the end of that year December 22nd. On December 22nd, 1951, there was an Executive Order referring to the dispute that had arisen between steel management and steel labor to the Wage Stabilization Board. That was nine days before a strike had been called by the Steel Workers Union of the C.I.O., and nine days before the expiration of the contract between the Union and the steel company.

Early in January, the Wage Stabilization Board, to whom the President had referred this dispute, appointed a six man panel; consisting of two public members, two industry members, and two labor members, and they brought in a report after extended hearings on March 13, 1952. That report is part of the opposing papers of the Government.

That panel report resulted in a board report, the Wage Stabilization Report. As that report is of some importance in the disposition of this controversy, I want to take the liberty of calling it to your Honor's attention by summarizing some of its more important provisions.

The Court: What is its relevancy? The controversy [fol. 1234] between the steel companies and the Union is not before this Court for adjudication.

Mr. Kiendl: Not at all, your Honor. But the record

mendations made by the Wage Stabilization Board touch on the very increases of wages and changes of terms of employment that the Secretary of Commerce has threatened to put into effect. We want to show what the effect of those changes, if adopted by the Secretary of Commerce, will be.

The Court: On the basis of irreparable injury?

Mr. Kiendl: Apparently that, your Honor, of course.

The Court: What is the other part?

Mr. Kiendl: The other part of it is to show that in reality what the Government is trying to do now is not to preserve the production of steel in this country, but to force on management, on industry, these increases in wages that the C.I.O. have demanded, and to some extent have been recommended by the Wage Stabilization Board.

The Court: How does the motive have any relevancy?

Mr. Kiendl: The motive, I don't think that has any relevancy, if your Honor please, but the facts have an important bearing on the effect of the Secretary of Commerce taking the threatened action. I am only going to summarize the dollar amounts involved so that your Honor will get a picture of what this amounts to.

The dollar damages here are almost incalculable, and [fol. 1235] I propose to demonstrate to your Honor that they are not the small amounts that were involved in the appropriately named case, the Pewee case, that was two thousand dollars, but this runs into hundreds of millions, literally.

Now, I would like to call your Honor's attention, if I may, briefly, to the summary of recommendations made by the Wage Stabilization Board in that report. I promise not to take much time doing it.

The Court: The time has not been limited. My inquiry was to ascertain its relevancy.

Mr. Kiendl: Yes, your Honor. I understand that, but I wanted to show you that I will try to conserve your Honor's time as much as I possibly can.

The first recommendation is regarding a general wage increase, and there the recommendation was that the wage increase be $12\frac{1}{2}$ cents an hour until the middle of the year; then $2\frac{1}{2}$ cents more; and then $2\frac{1}{2}$ cents more.

The recommendations regarding the geographical differential your Honor will read in the moving papers and in the briefs. They have a differential in the steel industry whereby in the southern plants the employees receive ten cents less per hour than in other parts of the country. The recommendation of the Wage Stabilization Board there was that that wage differential be reduced to 5 cents an hour.

Then there was a recommendation regarding a shift differential. [fol. 1236] These are some of the fringe benefits that your Honor will read in these papers.

The shift differential, increasing the second shift from 4 cents an hour more to 6 cents an hour; and the third shift from 6 cents an hour more to 9 cents an hour.

Then on the question of holidays, the Board recommended that the employees be given two times the hourly wages for Sunday work instead of one and a half times.

And on the question of vacations you had to work for twenty-five years before you were entitled to three weeks vacation with pay. That was reduced to fifteen years.

Then there was time and a quarter allowed for Sundays, where the custom and practice of the industry was to pay the same rate on Sunday as on every other day.

Finally—and perhaps even more important—the Wage Stabilization Board report recommended that there be put into effect a compulsory Union shop provision.

After that report came in a steel strike was called for one minute of twelve on the morning of April 9, 1952.

On the day before, on April 8th, the steps taken which are here involved were these:

The President issued an Executive Order No. 10,340. In that order the Secretary of Commerce was authorized to take possession of all the plants he deemed necessary to insure the continued and uninterrupted flow of the production of steel.

The President in his order said that that continued flow of steel was indispensable to the national defense and the national safety, and that any stoppage in the work in the steel plants and industry which had stoppage or substantially an industry which had stoppage would prove disastrous; and by specific provision of that Order, Paragraph 35 stated that the Secretary of Commerce should

have the power to determine and prescribe the terms and conditions of employment.

Now that Executive Order is attached to and made a part of our complaint as Exhibit C. Accompanying that Executive Order there is an exhibit B attached to our Complaint, the Order No. 1 that Mr. Sawyer issued taking possession of all the plants included in the list, and they are practically every steel plant in the United States.

The Court: May I interrupt you right there?

Mr. Kiendl: Yes; your Honor.

The Court: Will you inform me percentagewise the amount of the industry represented in this court this morning?

Mr. Kiendl: My best guess would be it would be close to one hundred percent.

The Court: It is very substantial, isn't it?

Mr. Kiendl: Very substantial percentage.

[fol. 1238] The Court: I notice that there are a great many others named in the Order No. 1 who are not before the Court this morning.

Mr. Kiendl: They haven't brought suit, some of them, as yet, just like we brought our suit somewhat later than Bethlehem.

The Court: They are small companies?

Mr. Kiendl: Comparatively small. I think all of the big companies, it is safe to say, are represented here.

Judge Bromley says it is closer to seventy per cent that are represented.

The Court: Seventy per cent?

Mr. Kiendl: That is what I am informed.

Now, on April 8th, after this General Order of the Secretary of Commerce was issued, he sent a telegram to the United States Steel Company, taking possession of all its plants. That telegram is made part of our Complaint as Exhibit A.

Now, in answer to that telegram, and we think this is important, Mr. Fairless of the United States Steel Company sent a telegram to Mr. Sawyer. It is not very long, and I take the liberty of reading it.

"I acknowledge receipt of your telegram of April 9th."

It should be April 8th.

[fol. 1239] "—advising that you have appointed me as operating manager on behalf of the United States of the properties of the United States Steel referred to in your telegram. Although under protest I shall act in that capacity. I must advise you that the United States Steel Company has been advised by counsel and believes that neither you nor the President of the United States has any authority under the Constitution or the laws to take possession of any of its property. On behalf of that company and myself I hereby protest against the seizure as unconstitutional and unlawful, and inform you that neither the company nor myself is acquiescing in this seizure in any respect whatever, and we intend promptly to vindicate our rights in court."

It is signed Benjamin F. Fairless.

Now on April 11th, two days later, the Secretary of Commerce issued a notice entitled "The Organization of the Steel Industry".

The Court: What was the date of Judge Holztoff's decision?

Mr. Kiendl: April 9th. Wednesday, April 9th, 1952.

This notice issued by the Secretary of Commerce was to be effective April 11, 1952. It is referred to fairly fully [fol. 1240] in one of the affidavits of the United States Steel Company that is before your Honor, the affidavit of Mr. Stephens. I am reading from a copy of it that I have and not from the affidavit.

In that circular the Secretary of Commerce advises of the establishment of an internal organization under this order for the seizure and operation of the steel mills.

It provides, among other things, for a Controller to establish systems of financial reporting and analyses; a Controller who shall see that the affected companies maintain such records and make such reports as those systems and those analyses require.

• It set up a Production Division to review and analyze reports from the operating managers to supply information relative to the materials and conditions of employment,

and to furnish the Secretary with data necessary for him to report to the President on the actions he is taking, and the results of these actions.

It set up a Compliance Division; a division that was authorized and directed to audit compliance with all orders and regulations issued by the Secretary; to make such investigations and inspections as are necessary; and to formulate and recommend such corrective enforcement measures as are necessary.

[fol. 1241] Finally it set up a Solicitor of the Department of Commerce as the chief legal officer for steel industry operations; to furnish legal advice and to provide necessary public orders and regulations.

After that announcement on April 12th, the Secretary publicly announced—and this is somewhere in the moving papers, and for the minute I can't put my finger on it, your Honor, but I hope you will take my word for what I am saying in this and every other respect. It is contained somewhere in the application before you. The defendant made an announcement there that he would take no action on any change in the terms and conditions of employment while negotiations, collective bargaining negotiations, were going on, under the aegis of Mr. Steelman, that nothing would be done while negotiations were pending until they were terminated.

Three days later, negotiations had been terminated, and on Friday, April 18th, there was an announcement, public announcement, by the Secretary of Commerce that on Monday or Tuesday the following week he would undertake to consider terms of employment in the steel industry.

That is all embodied in Mr. Stephens' affidavit.

That was Friday.

On Sunday, April 20th, the Secretary of Commerce went on television, and in the course of his remarks on the Meet [fol. 1242] the Press program, he is not only reported to have said, but the record shows actually, that he said the things that I am about to read to your Honor. We have the phonographic recording of what transpired at that, and I doubt if there is even the remotest possibility of the Government contending that it is inaccurate.

This question was addressed to him by one of the members of the press:

"Are you saying then that there is a chance that you will not grant any increase at all, Mr. Sawyer?"

And he answered:

"No; I am not saying that. On the contrary there will certainly be some wage increases granted."

And the next question was:

"There will be some wage increases granted?"

And he answered:

"There will be; yes."

And then the question:

"But you haven't yet decided how much?"

And he answered:

"That's right."

Now, we say the mere recital of that chronological outline is distinctive and strongly persuasive of the fact that action, immediate, imminent, irremediable, and irreparable, is about to be taken by the Secretary of Commerce to [fol. 1243] change the wages and other terms and conditions of employment in the steel industry. It affects this particular company, whose property has been seized to the tune of hundreds of millions of dollars; whose properties are scattered in six or seven states of the United States; and which now employs over 200,000 employees.

Now the effect of that action we think is vitally important for the consideration of this Court of equity in ascertaining whether or not this illegal and unconstitutional action on the part of the Secretary of Commerce must cease so far as these terms of employment are concerned.

I come to what I consider to be one of the most important documents in this case, the affidavit prepared and executed by Mr. John A. Stephens, the Vice President of United States Steel Company in charge of its industrial relations.

I do not think that there is real likelihood that any of the allegations in this Stephens affidavit will be or can be seriously controverted by the attorneys for the Government.

Among other things, Mr. Stephens alleges—

The Court (Interposing): Where would I find that?

Mr. Kiendl: It is in the file.

The Court: Mr. Kiendl, apparently there are a great [fol. 1244] many affidavits and many of them have not gotten into the file that is before me.

The Clerk tells me that they have volumes of material out there and I confess at this point that I do not have the affidavit before me and the Clerk has not been able to find it.

Mr. Kiendl: I do not know how I can help him, your Honor.

The Court: I want to make sure when I take this case that I take what is filed and not something else.

Mr. Kiendl: Of course.

May I suggest that when I read from an affidavit that I will call your Honor's attention to the exact page of the affidavit where the material I read is to be found, as far as I can.

The Court: May I take a copy and mark it up?

Mr. Kiendl: Certainly, I am sure that would be helpful.

May I proceed?

The Court: Yes.

Mr. Kiendl: He discusses the effect that this contemplated action of the Secretary of Commerce will have upon collective bargaining and what collective bargaining means, and, if your Honor please, I am referring to Pages 6 and 7 of the Stephens affidavit where he says:

"I have represented plaintiff and its predecessors in negotiations with the Union since 1942. I have never made an offer to settle any single issue except on condition that all the issues under negotiation be resolved."

And, on the next page, Page 7 of the Stephens affidavit, beginning with the fifth line, he says:

"The process of collective bargaining is the process of the settling of all issues as a 'package'. This is a

principle of collective bargaining that cannot be violated."

And we ask counsel for the Government to state whether he disagrees with the *ascertain* of that principle of that affidavit.

The affidavit goes on:

"The placing into effect by defendant of increased wages and other benefits demanded by the Union would deprive plaintiff permanently of the use of concessions in these matters as a means of settling other issues in dispute."

Now, on the question of incalculable damages that this plaintiff will sustain if any action is taken comparable to the recommendation of the Wage Stabilization Board in its report, I have summarized Mr. Stephens statements in the affidavit from Pages 10 to 14 of the affidavit and it shows—and I do not think this can be seriously denied in any essential fact—that the recommendation for the increase in wages is a matter to be seriously weighed and considered by the [fol. 1246] Court.

Paragraph 12 of the Stephens affidavit says that:

"The Wage Stabilization Board recommended increased wage rates of 12½ cents an hour as of January 1, 1952, 2½ cents per hour as of July 1, 1952, and a further 2½ cents per hour as of January 1, 1953. Such increases in wage rates would result in still greater increases in direct employment costs as a result of the compounding effects of other factors. The annual cost to plaintiff of increases directed by defendant and the resulting compounding effect of four of these factors, namely, overtime premium, vacation costs, payroll taxes and pensions for plaintiff's production and maintenance employees alone would total \$54,900,000 in 1952 and at rates effective January 1, 1953, \$69,800,000 in 1953. Comparable increases in employment costs for plaintiff's other employees would increase the total annual cost of the increased wage rates put into effect by defendant to \$79,700,000 in 1952, and at rates effective January 1, 1953, \$101,400,000 in 1953."

That is down toward the end of the paragraph, about six or seven lines from the bottom of Paragraph [fol. 1247] graph 12.

If the Wage Stabilization Board recommended that three-week paid vacations be granted to employees of fifteen years' standing instead of the present requirement of twenty-five years' employment for such vacation as to be made effective that would run into some \$3,000,000 and over.

If the Wage Stabilization Board's recommendation that employees be granted six paid holidays per year and that employees who work on such holidays be paid double time for time worked, it will cost this plaintiff, according to Mr. Stephens' affidavit, as set forth in Paragraph 14, over \$12,000,000 in 1952, and \$13,000,000 in 1953.

If the Wage Stabilization Board's recommendation that the plaintiff increased its shift differential of 4 cents for the second shift to 6 cents per hour and the differential of 6 cents for the third shift to 9 cents per hour is granted, such increased shift differentials, according to Paragraph No. 15, of Mr. Stephens' affidavit, would cost the plaintiff nearly \$5,000,000 annually for production and maintenance employees, or \$5,700,000 including other employees.

Now, your Honor, Paragraph No. 16, of the Stephens affidavit shows that if the recommendation of the Wage Stabilization Board is carried out, this plaintiff would pay, effective January 1, 1953, time-and-one-quarter for work performed on Sundays. Sunday work is now compensated at [fol. 1248] the same rate as is work for other days of the week and this increase would increase plaintiff's employment costs annually some \$13,000,000, beginning January 1, 1953, and, including Plaintiff's other employees, the annual cost of this benefit would total practically \$15,000,000, or to be more nearly exact, \$14,900,000.

For the southern operation differential, reducing it from 10 cents per hour to 5 cents per hour, would cost this plaintiff over \$2,600,000; that is shown in Paragraph 17 of the Stephens affidavit.

Now, in Paragraph 18, Mr. Stephens summarizes the items shown in Paragraphs 12 to 17 and shows that these items would cost some \$100,400,000 in 1952, and \$141,000,000 in 1953—that is at the bottom of Page 11 of the affidavit.

It is shown in that same paragraph, Paragraph No. 18, that the added employment costs which the defendant threatens to impose on the plaintiff would average 29.8 cents per employee hour.

Now, he goes on to point out that that is not all. This \$100,000,000 for one year and \$140,000,000 for the next year, is not all by any means, because the plaintiff, of course, has to buy products and services and the cost of those products and services run about the same as does its employee cost, that is, the cost of the products and services go up as is shown in the affidavit or when wages are increased in the steel industry they have always been similarly increased in other industries whose products the steel industry must buy, with the result that plaintiff's costs of products and services have, as I say, advanced about the same dollar amount. The cost of the products and supplies closely parallel the cost of wages and employment costs and costs of purchased products and services together represent approximately 80 per cent of all costs of plaintiff's operations, and, if Mr. Stephens' allegations are correct—and they cannot be denied—the cost of the wage increase is double and, instead of being \$100,000,000 for 1952 would be \$200,000,000 for 1952 and, in 1953, would be \$280,000,000 instead of \$140,000,000.

Now, Mr. Stephens, at Page 14 of his affidavit, makes the unequivocal statement that the plaintiff will be unable to procure a price increase based on increased wages, and he points out in Paragraph 21 of his affidavit, that Mr. Ellis Arnall, the director of Price Stabilization, testified before the Senate Labor and Public Welfare Committee, and asserted, or reasserted, his position that even if the wage increases recommended by the Wage Stabilization Board were put into effect he would not approve a price increase for steel products based upon the increased wages and other additional costs resulting from granting the benefits in issue.

[fol. 1250] If Mr. Arnall has not been correctly reported in his testimony, we would like to hear Government counsel tell us so right now.

In his conclusion Mr. Stephens states as a practical and realistic matter that once a wage increase is granted to a

Union of this size, once such increased benefits are granted to plaintiff's employees, they cannot be taken away; and that there is, in fact, no possibility of ever taking away that wage increase. You will find that averment at Pages 15 and 16 of the affidavit.

Mr. Stephens concludes his affidavit with the statement, the last clause in the final paragraph of the affidavit, but one, that:

"During the past 15 years there has not been a single general reduction in the wage scale of plaintiff's employees or in fringe benefits."

I think no one can question the accuracy of that statement.

That affidavit of Mr. Stephens is one affidavit that the plaintiff has submitted in this case.

There is another affidavit, an affidavit by Mr. Lewis M. Parsons, the Vice President of United States Steel Company.

Without reading Mr. Parsons' affidavit or referring to it in detail, I would like to say to your Honor that he points out very clearly and persuasively that the increase in terms [fol. 1251] and conditions of employment divest his company of the absolute freedom of direction on the part of its management, a freedom of direction which is essential to the operation of the company with the greatest possible effectiveness, and he states in his affidavit that that freedom of management will be very substantially and unquestionably impaired.

Mr. Parsons states in his affidavit that the program of the company for property improvement is now very extensive, and will run into many millions of dollars.

Mr. Parsons also states that the program for capital expenditure will be interfered with and will be impossible to carry that program out.

Mr. Parsons points out in his affidavit in a manner which is not just general but is convincing, that the pecuniary loss to his company in this situation is immeasurable.

Now, we would like to point out to your Honor that this seizure is not only clearly unconstitutional and illegal but it flies squarely in the face of the provisions of the Labor Management Relations Act of 1947.

This situation was thought unanticipated, however. Congress considered it at great length and Congress adopted the Labor Management Relations Act of 1947, and your Honor, although you are familiar I have no doubt with the [fol. 1252] provisions of the Act will be somewhat astounded when I read the language enacted because of the close parallel that it bears to the question here involved.

I have before me the United States Code Annotated, Section 176, and I am reading that paragraph:

"Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, . . ."

which is exactly the situation the Government describes in the affidavit it submits in support of this motion,

" . . . he . . ."

that is the President,

" . . . may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations."

[fol. 1253] And then, Section 178 of that same statute:

"Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—"

Mark that, that is the court:

"... shall have jurisdiction to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out:

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate."

It then goes on, in Section 179, your Honor, to provide for this eighty-day breathing spell and says:

[fol. 1254] "(b) Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to this dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public."

Then, continues the Act,

"The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter."

Now, that statutory provision giving that specific authority to the President to meet a situation which the Government says now arises was ignored and flouted completely

in what was done here, and this action was taken by the President, by the Secretary of Commerce, despite the fact [fol. 1255] that in the very extended debate on that bill a resolution was introduced in Congress providing for an amendment of the bill in order to give the President precisely the power to seize industrial plants, and that amendment that would have given the President that power which he now seeks to exercise, was overwhelmingly voted down.

So there can be no doubt that the Labor Management Relations Act never intended, nor did it contemplate or authorize the steps that have been taken in this seizure of these steel mills.

Now, your Honor, it may be suggested that this is a suit against the President of the United States—

The Court (interposing): Before you get to that point may I ask one question?

Mr. Kiendl: And, therefore, the court has no jurisdiction.

Yes, your Honor—I will be glad to answer any question.

The Court: You have argued that the Taft-Hartley Act anticipated this situation and that its provisions are applicable to this situation and that the Taft-Hartley Act was ignored; that a constitutional remedy as well as a statutory remedy was provided by the Congress, and you have referred me to the eighty-day breathing spell.

[fol. 1256] Mr. Kiendl: Yes.

The Court: The eighty-day breathing spell to take care of the emergency—that is what it was for?

Mr. Kiendl: Nothing more.

At the end of the eighty-day breathing spell, the injunctive order comes to an end and all that follows thereafter would be the reporting by the President to the Congress as to what had transpired if Congress, if it saw fit, the opportunity to legislate in connection with the controversy.

The Court: So, there is no statutory provision after the expiration of the eighty-day period as you see it?

Mr. Kiendl: I think that is literally correct.

Now, on the question of whether this is a suit against the President and the Court has jurisdiction to grant the requested injunction:

Our point VII of our brief points out or refers to, a number of cases.

We refer to two cases in the Supreme Court, one, particularly, that was decided in the year 1949 and is reported in 330 U. S. 682, the case of *Larson vs. Domestic and Foreign Commerce Corporation*.

The Court: In what branch of your brief is that?

Mr. Kienzl: That is in our Part VII, and the first reference to the *Larson* case is on Page 2 of Part VII.

[fol. 1257] The *Larson* case is the first case cited. There the Supreme Court said this:

“ . . . the action of an officer of the Sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so ‘illegal’ as to permit a suit for specific relief against the officer as an individual only if not within the officer's statutory power, or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.”

Then, in the case of *Land vs. Dollar*, also reported in 330 U. S. at Page 731, the Court said:

“But public officers may become tort-feasors by exceeding the limits of their authority, and where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law, or in equity, he is not relegated to the Court of Claims to recover a money judgment.”

On that same page of our brief we refer to the case of *Ickes vs. Fox*, at the bottom of the page, reported in 300 U. S. 82, (1937). We refer to that case following our statement that the principles which are followed in determining whether a suit will lie against a Federal officer are necessarily those which govern the problem of indispensable [fol. 1258] parties.

In the *Ickes* case the Supreme Court had for consideration the question whether the Secretary of the Interior could be enjoined from enforcing an order issued under the Reclamation Act of 1902. The Court asserted that if the United States was an indispensable party-defendant, the suit must fail, regardless of its merits, but held that the United States was not an indispensable party in a suit to

enjoin enforcement by a Government official of an order which would illegally deprive the plaintiff of vested property rights. The Court granted relief on the recognized rule set forth in the case of *Philadelphia Company vs. Simpson*, 223 U. S. 605, at 619, reported in 1912.

The next case is the *Williams* case, the case of *Williams vs. Fanning*, 332 U. S. 490, a case reported in 1947. This was a suit to enjoin a local postmaster from carrying out the postal fraud order of the Postmaster General and the Supreme Court there reaffirmed the rule that:

"The superior officer is an indispensable party if the decree granting the relief sought will require him to take action either by exercising directly the power lodged in him or by having a subordinate exercise it for him."

[fol. 1259] In language peculiarly pertinent to the present situation the Court stated that equitable relief could be granted against the subordinate without joining his superior in situations where:

"... the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the Court."

Counsel for the Government point out in their memorandum and rely on exhibits with particular reference to the case of *Marbury vs. Madison* reported in 1 Cranch. 137 (U. S. 1803). What we point out in answer to that, on Page 5 of Part VII of our brief, or commencing at the bottom of Page 4, that the quotation from *Marbury vs. Madison* is similarly directed towards the discretion of the President in the exercise of the specific political powers with which he is invested by the Constitution. It has no bearing on the power of the Federal Courts to restrain an Executive officer whose actions are completely beyond the constitutional powers of the Executive. We quote on page 5 of Part VII of our brief from the *Marbury* case where the Court observed:

"Is it to be contended that the heads of departments are not amenable to the laws of their country? What-

ever the practice on particular occasions may be, the theory of this principle will certainly never be main-
[fol. 1260] tained."

Now, your Honor, we have contended—and we think it important to persuade your judicial mind that there is a very serious basis for our contention—that this seizure is entirely unlawful and is wholly unconstitutional.

So far as we are aware, and so far as our research is concerned, the doctrine of unlimited power in the Executive has never been recognized or accepted in this country anywhere. If it were recognized and accepted in this country, then the unlimited, definite, all embracing power on which the Government is so nebulously relying would put us in a position where we in this country would be on the high road over which some executive at some time would go and would go on and on to despotism, dictatorship and tyranny.

Indeed, there is a limit on the powers on even the Executive of this nation that must be found within the four corners of the Constitution of the United States, and that Constitution of the United States provides explicitly for the powers of both Congress and the President of the United States.

I should like, for the purpose of this record, to briefly call your Honor's attention to some of the most important:

[fol. 1261] Article I, Section 8, of the Constitution, describes the powers of Congress, and we think that these are particularly interesting and significant respecting the argument which we are making:

"The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States;"

That is the first part of Section 8, of Article I of the Constitution.

Then, further down in Section 8 of Article I we find that the Congress shall have the power:

"To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;
To establish an uniform rule of naturalization. . . ."

et cetera;

"To declare war, . . .
 To raise and support armies, . . .
 To provide and maintain a navy;
 To make rules for the government and regulations
 of the land and naval forces;"

and:

"To make all laws which shall be necessary and
 [fol. 1262] proper for carrying into execution the fore-
 going powers, and all other powers vested by this Con-
 stitution in the government of the United States, or in
 any department or officer thereof."

By contrast, the Executive is given these powers by
 the Constitution in Article II, Section 1:

"The executive power shall be vested in a Presi-
 dent of the United States of America . . ."

Then, Article II, Section 2:

"The President shall be commander in chief of the
 army and navy of the United States, . . ."

and, may I point out, not at all facetiously, that that lan-
 guage "shall be commander in chief of the army and navy of
 the United States" is just that: Commander in chief of the
 Army and Navy of the United States, and not "Commander
 in chief of the economic resources of this country".

Section 3 of Article II of the Constitution states the
 executive and other duties of the President and says:

" . . . he shall take care that the laws be faithfully
 executed, . . ."

And it is from those express powers that I have read,
 and those alone, from which the Government would derive
 this power that the President has attempted to exercise in
 this situation.

[fol. 1263]. Now, we say that that interpretation of the
 Constitutional provisions runs counter to its express lan-
 guage and runs counter to the express intent of the found-

ers of this republic and it runs counter to English history and runs counter to what was contemplated in the Magna Carta.

In the Magna Carta it is provided, your Honor, that:

"No free man shall be taken or imprisoned, or disseised"

except on lawful judgment of his peers or by the law of the land.

That is an enactment preventing public officers from taking property from citizens without the lawful judgment of his peers.

Now, I skip over four centuries to the famous *case of Ship Money* (the King vs. John Hampden). That case came on before the Court on three grounds of common law, and before a great many judges before its conclusion and it is significant that the lawyers for the King, for the Crown, in that case presented a defense almost identical to the argument presented here in his defense the Attorney General and his associates. They relied there on the claim of "National emergency", "common defense", and "inherent powers of the Commander-in-chief", as I shall proceed to try to point out to your Honor.

In Point IV of our brief, your Honor, you will find a [fol. 1264] rather extensive discussion of that case. There we recite the facts:

There had been proclamations made reciting that although England was then at peace with the world there were wars raging on the continent of Europe, that the seas were unsafe, and that England was in danger of losing control of the sea and of invasion, and the King in that emergency situation took it upon himself to require the various counties forthwith to provide ships for the common defense of Great Britain.

The case came on before a number of judges, as I said, and the King, the Crown won, but the judges were subservient to the King and the Crown, for reasons that were clear, prevailed.

In the argument of the case the Attorney General there rested on the inherent powers of the King as Commander in Chief, and argued even that in time of emergency Magna

Carta and statutes must give way to that inherent power possessed by the King, by the Crown itself.

A great majority of the judges accepted the King's views.

Mr. Justice Crawley—I mention him now and I will again, said then:

“It doth appear by this record, that the whole king-
[fol. 1265] dom is in danger both by sea and land, of
ruin and destruction, dishonor and oppression, and that
the danger is present, imminent and instant, and greater
than the king can without the aid of his subjects, well
resist. Whether must the King resort to Parliaments?
No. We see the danger is instant and admits of no
delay.”

Within three years Mr. Justice Crawley who wrote that
opinion and a number of other judges in favor of the
Crown, were impeached and removed from office for having
—and I read the language:

“ . . . traitorously and wickedly endeavored to
subvert the fundamental laws and established govern-
ment of the realm of England, and instead thereof to
introduce an arbitrary and tyrannical government
against law,”

and the judgment in that very case was cancelled as being
against the laws of the realm, and the King as the eventual
sequence of that and other actions lost his head—that was
Charles I.

Not long after, James II, came in—

The Court: Do you think this argument is serving a
useful purpose?

Mr. Kiendl: Your Honor, I would not be making this
argument unless I thought it did serve a useful purpose
and unless I thought that that purpose was one definitely
[fol. 1266] tending to show your Honor that the constitu-
tional power here concerned and asserted is absolutely
non-existent, and I cite what happened under the reign of
Charles I, your Honor, and point out that the Constitu-
tion was enacted with knowledge of what transpired in
England, and, in spite of that, we are faced with the same

attempt now to make operative that which was then condemned.

Let me point out that in the *case of the Seven Bishops* what transpired.

I will jump many centuries in a hurry:

In 1688 when King James II had claimed the power to dispense with the laws, seven bishops had the courage to file a petition asking him to change his position and they were first indicted, and the case came on before the famous jurist, Mr. Justice Powell, and he declared that the claimed prerogative: ———

“ . . . amounts to an abrogation and utter repeal of all the laws . . . ”

and that:

“If this be once allowed of, there will be no need of Parliament; all the legislature will be in the King, which is a thing worth considering.”

Now, a decision under the Constitution, in the year 1804, [fol. 1267] which we think is particularly apt and appears to show the illegality of this action, is the case of *Little vs. Barreme*, reported in 2 Cranch 170 (U.S. 1804).

In the *Little vs. Barreme* case there was an act of Congress which authorized, during the existence of an undeclared war with France, the seizure of vessels going into French ports. The President issued an order directing the seizure of vessels going into and coming from a French port. Such vessels were seized. The owner sued for damages and restoration, and, in the United States Supreme Court, the Chief Justice held the action of the President was unauthorized, and the vessel was restored to its rightful owner and the captain was held liable in money damages.

Now, the Government may attempt to justify this seizure under some construction of the power of the Executive as Commander in Chief of the Army and Navy. I do not think that they stress that too strenuously; they shy away from the argument, but if it be made and pressed, we point out in Point IV of our brief some of the cases that hold that the exercise of this power of the Commander in Chief

is only possible where there is an imminent emergency and a danger so pressing that the slightest delay will prove disastrous. I will not burden the Court with further argument on that but refer you, particularly, to Section IV of our brief.

[fol. 1268] We submit that the minimum that the plaintiff is entitled to is a preliminary injunction against this threatened change in working conditions, terms of employment, and so forth.

We point out in our brief a very significant case decided in this very court by your colleague Judge Schweinhaut, *Publicker Industries, Inc. vs. Anderson*, 68 Fed. Supplement 532 which was decided September 22, 1946.

There, in the *Publicker Industries, Inc.* case an action was brought by the plaintiff to enjoin the Secretary of Agriculture for using the historical basis for granting allocations on grain, and held that he had disobeyed the Congressional mandate against allocations, and so forth. It was held that the suit was not one against the United States and he denied the motion to dismiss and issued a preliminary injunction restraining the *the* defendant Secretary of Agriculture from using that basis for making allocations.

Also, in 279 U.S., at Page 813, is to be found the case of *Ohio Oil Company vs. Conway*. This is particularly apt in considering the matter that we have here, and you will find reference to it with a quotation starting at the bottom of Page 7 of Section 6 of our brief:

"Where the questions presented by an application [fol. 1269] for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted."

I say here, parenthetically, that the questions are grave and certainly the damage that will occur will be irreparable.

The situation in the *Ohio Oil Company* case is exactly the situation here.

Now, I want to go back to this question of the balance of convenience argument which was argued before Judge Holtzoff, and he decided this case rather forceably, and we treat this question of the balance of convenience at Page 8 of Section 6 of our brief, in a manner which we say supports the issuance of a preliminary injunction.

The only argument that the defendant could make against the issuance of an injunction pendente lite, restricted to the prevention of a change in the terms and conditions of employment imposed by the defendant, would be that the production of steel would be interrupted by a strike called by the Union, because of its refusal to permit the employees [fol. 1270] to work unless the employment conditions are changed. This amounts to an assertion that an injunction should not issue because the Union will strike against it. But, if they do, they violate the law of the land; their acts would be unlawful, and they are not permitted to strike against the Government as we all well know.

Here, all the decisions are clear on the proposition that the employees of this plaintiff are the employees of the Government, and that is succinctly stated in United States vs. United Mine Workers, 330 U. S., at Page 204.

The Court: Are you not guilty of enunciating a non sequitur there?

Mr. Kiendl: Probably I am guilty of many.

The Court: If I should grant a preliminary injunction, the position of Mr. Sawyer would cease to exist in respect the steel industry.

Mr. Kiendl: Not with what we are asking.

The Court: I thought you were asking for an injunction enjoining Mr. Sawyer from continuing in possession and control of your property.

Mr. Kiendl: Our point is clear on that.

I state unreservedly now that what we are trying to accomplish by this motion is to obtain a temporary injunction restraining the Secretary of Commerce from changing the terms and conditions of employment.

[fol. 1271]. The Court: Your moving papers in the United States Steel Company case, Civil Action No. 1625-52 are predicated on the fact that you are moving the Court for an order granting a preliminary injunction against the de-

defendant Sawyer until the further order of the Court upon the grounds stated in your bill and in accordance with the prayer in the complaint.

Mr. Kiendl: Yes; and the prayer in the complaint is all-inclusive, your Honor, but we submit, under accepted practice, that we are asking here only for one branch of that general relief and the only branch we are asking your Honor to issue a temporary injunction on is that branch dealing with the wages and terms of employment.

The Court: All you ask us, then, is the preservation of the status quo?

Mr. Kiendl: Exactly.

The Court: Is that what the others are asking?

(There was a response by several made contemporaneously in the affirmative.)

Mr. Kiendl: Of course, that is what the others are asking.

The Court: Your moving papers ask for everything.

Mr. Kiendl: I know that our moving papers ask for anything and everything, and in stating what I have stated we are not waiving our rights in any way, shape or manner. [fol. 1272] But all that we are asking presently is that you prevent the irreparable damage that flows and will flow from the change in the terms of employment and which will flow by the additional wages—those are the benefits we are asking at this time. The granting of that will not stop the operation of the mills.

The Court: Well, the reason I thought that you were guilty of stating a non sequitur was because I thought that you were asking for a preliminary injunction restraining the defendant from continuing in possession. If that were done the employees would not be employees of the United States, and your cases in that respect would not be in point.

Mr. Kiendl: I had hoped that I had made my reservation clear: We are asking to have the status quo continue until we have a full trial on the merits—and the sooner that can be had and the case decided the happier we will all be.

We are asking your Honor to issue a preliminary injunction immediately restraining this defendant from changing any of the terms and conditions of employment so far as the employees of the United States Steel Company are concerned.

The Court: Well, the representatives of the other defendants arose and said: Yes; that was all that they are [fol. 1273] asking.

Mr. Bromley: That is not all that Bethlehem Steel is asking for, your Honor: We have filed a motion for a preliminary injunction and our position is "the whole hog."

The Court: If I should hold that the defendant acted without authority of law, as I understand the law, I should grant a preliminary injunction unless, in weighing convenience and balancing the equities, I find it would not be equitable to do so.

All right, gentlemen, the Court will recess for a few moments.

(Thereupon at 11:25 o'clock a.m. recess was taken following which this occurred:)

[fol. 1274] Mr. Kiendl: If Your Honor please—

The Court: Wait just a minute.

You have an announcement to make before you go on your next point?

Mr. Kiendl: No; Your Honor, I have no announcement to make.

The Court: Before you go on to your next point, I want to ask you to state clearly and succinctly what you are asking for, because the moving papers are broad enough to ask for everything that you pray for in your complaint.

Then I want to have the other plaintiffs stand up and be counted and identified if they agree with that, so the record will be clear on that point.

Mr. Kiendl: I would like to have it clear, Your Honor. I am sorry I didn't make it clear before.

We are asking Your Honor to issue a preliminary injunction immediately restraining this defendant from changing any of the terms and conditions of employment so far as the employees of United States Steel Company are concerned.

The Court: Will the other plaintiffs rise and state whether that is all they are asking for?

Mr. Bromley: May it please Your Honor, that is not all Bethlehem is asking for. We have filed a motion for preliminary injunction asking that the seizure be enjoined. [fol. 1275] We thought the prayer was broad enough to

include as alternative relief, if Your Honor did not desire to go so far, the precise relief against any change.

So our position is the whole hog. If not that, an injunction against any change in our rates of pay or terms of the conditions of employment.

The Court: Well, if I should hold that the defendant acted without authority of law, as I understand the law I should grant a preliminary injunction, unless in weighing convenience and balancing the equity, that would be inequitable.

Mr. Bromley: That is right; sir.

The Court: Perhaps the law is, I am not sure, that if I find that he acted without warrant of law, I shouldn't weigh the equity.

I am not sure about that.

Mr. Bromley: I think that is the law.

The Court: But I can't understand Mr. Kiendl's position when he asks me to find the act illegal, and yet he wants to continue the illegality. That is the reason I was astonished when he told me that that was all you were asking, because it seems inconsistent to me.

Mr. Kiendl: That is all we are asking for at this time; I am trying to make it clear that we are not waiving the right to a full hearing of the whole thing.

[fol. 1276] I feel the mills must be restored to their rightful property owners.

Mr. Bromley: May I say, Your Honor, because I feel compelled to do so, that does not involve any non-sequitur to which Your Honor averted because if you do, and Taft-Hartley immediately springs into action, there is no danger of interruption of steel production because the Taft-Hartley can still be availed of immediately by the President of the United States.

The Court: If I do what?

Mr. Bromley: If you order our properties returned to us.

The Court: All right.

Mr. Bromley: All right.

The Court: The non sequitur is the one which I alluded to with reference to the argument about the nature of employment.

Mr. Bromley: I understand that. I thought Your Honor was suggesting that if you ordered the return of the prop-

erties the strike would immediately follow, and the Government would be helpless. That is not so.

The Court: How about the other plaintiffs?

Mr. Day: Republic takes the same position as was just stated.

Mr. Warner: Speaking for Jones & Laughlin Corporation, [fol: 1277] I would agree with Mr. Bromley's position for Bethlehem.

Mr. Wilson: If Your Honor please, speaking for Youngstown I too agree with Mr. Bromley.

I think that this explanation might be made at this point: On the application for temporary injunction, I hoped that we might raise a sufficiently serious doubt in Your Honor's mind about the legality of the seizure so that Your Honor would then pass to the question of irreparable injury and to the question of balance of equity; thus give us the immediate relief which is exemplified and portrayed in the late affidavits which have been filed only this morning and served yesterday.

But of course if in the course of the arguments today or before they are concluded we may have time of Your Honor to consider the ultimate legal question, we certainly want that opportunity to convince you that the action of the President is illegal; the action of the defendant is illegal; and that—

The Court: If you should convince me of that, you wouldn't want me to perpetuate the illegality, would you?

Mr. Wilson: I never look a gift horse in the face, Your Honor.

The Court: I am not speaking facetiously.

Mr. Wilson: I am not either.

As I say, of course we want that relief.

[fol. 1278] The Court: I think it is an inconsistent position you are taking.

Mr. Wilson: For us not to want the ultimate relief?

The Court: Yes; I think because unless you ask for it you admit the legality.

Mr. Wilson: We ask for it and of course we argue the act is illegal, but whether a Judge on an application for temporary restraining order will give the time and have the opportunity to give the time to resolve the ultimate question is a matter which occurred to me.

Naturally if all we can do today in the time that is allowed us is to raise a reasonable and serious doubt in Your Honor's mind about the legality of the situation, then we are entitled to the lesser relief; to the temporary relief, as Your Honor calls it, maintaining the status quo.

But of course if Your Honor is going to have the patience to listen to the ultimate legal question, we are ready to argue it.

The Court: I have the patience.

Mr. Peacock: Speaking on behalf of E. J. Lavino & Company, we press for the ultimate relief. That is, we want our properties restored to us.

The Court: Who hasn't spoken?

Mr. Tuttle: I haven't, Your Honor. On behalf of the [fol. 1279] Armco Corporation and Sheffield Steel Corporation, the immediate relief we are asking for here is to prevent commitments which will be beyond the power to recall and will change the situation in such wise we can have no remedy.

As part of the argument on which we base that application of that immediate relief we are contending that the seizure that has been made is illegal, and we believe that that is part of the situation which produces the lack of power.

But whether we are right or wrong in that, and we think we are very right, we would still contend that the immediate relief that we are asking for should be granted because, even assuming the power under any circumstances to have some seizure we contend that our monies and our rights cannot be committed in such wise that we can have no remedy.

The Court: Who hasn't spoken?

(No response.)

The Court: Is that all that are before me?

Mr. Bane: It is, Your Honor.

The Court: Mr. Kiendl, all you want is the preservation of the status quo?

Mr. Kiendl: At this time that is all we are asking Your Honor to do.

[fol. 1280] The Court: That includes wages, working conditions, union shop, and increase in price of steel?

Mr. Kiendl: Increase of price of steel. It is a question of

wages and materials, of employment, terms and conditions of employment.

The Court: What?

Mr. Kiendl: It is a question only of the terms and conditions of employment.

The Court: Louder. Your voice dropped when I asked you about the price of steel.

Mr. Kiendl: I know I did, Your Honor. I hope Your Honor doesn't draw any legal conclusion from that lowering of my voice.

The Court: Well, I didn't understand you.

You feel that the status quo should be maintained in respect to the price of steel as well as all these others?

Mr. Kiendl: I think so. If we are going to maintain the status quo we must do it both ways.

I don't want you to have any apprehension that we are not interested in getting our property back. We are. But all we are averting to do this morning is that at least there is a very serious doubt about the seizure, sufficient to warrant your court now presently issuing this temporary injunction that we ask for.

The Court: And if you should prevail, you would submit [fol. 1281] an injunction which would preserve the status quo with reference to wages, working conditions, union shops and price of steel?

Mr. Kiendl: Yes, Your Honor.

The Court: And would not take advantage of any benefits under the Capehart amendment?

Mr. Kiendl: Certainly not, Your Honor.

The Court: I see.

Mr. Kiendl: Now, Your Honor, I was discussing this question of the balance of convenience, requiring the granting of the type of injunctive relief we are asking here.

The Court: Is the Government opposed to that, what he asks for?

Mr. Baldridge: Yes, Your Honor.

The Court: All right. You are opposed to maintaining the status quo?

Mr. Baldridge: Our position is, Your Honor, that Mr. Sawyer has the job of running the steel plants as long as they are in Government possession.

The Court: Well, then, the answer is "No."

Mr. Baldridge: That is right.

The Court: All right.

I thought if you were in agreement we might terminate this hearing so far as Mr. Kiendl was concerned.

[fol. 1282] Mr. Kiendl: Your Honor, I was discussing the problem as to whether or not the present employees in this industry, and particularly in our mills, were governmental employees or whether they were employees of the United States Steel Company. I draw Your Honor's attention to the United Mine Workers case.

Here is what the Supreme Court had to say on that subject:

"Defendants contend, however, that workers in the mines seized by the Government are not employees of the Federal Government; that in operating the mines thus seized the Government is not engaged in a sovereign function; and that, consequently, the situation in that case does not fall within the area which we have indicated as lying outside the scope of the Norris-LaGuardia Act. It is clear, however, that the workers in the mines seized by the Government under the authority of the War Labor Disputes Act, stand in an entirely different relationship with the Federal Government with respect to their employment from that which existed before the seizure was effected. That Congress intended such to be the case is apparent both from the terms of the statute and from the legislative [fol. 1283] deliberations. Section 3 of the War Labor Disputes Act calls for the seizure of any plant when the President finds the operation is threatened by a strike.

"Congress intended that by virtue of government seizure a mine should become, for purposes of production and operation, a government facility in as complete a sense as if the government had full title and ownership."

And in the very recent case of *U. S. v. Brotherhood of Locomotive Firemen* in the Northern District of Ohio, Judge Freed on this very subject had this to say:

[fol. 1284] The Brotherhood has cited that the seizure was a mere token or sham seizure and that the

railroad workers therefore were not employees of the United States Government, and he observed the unions are inviting this Court to distinguish or disagree with the holding of the Supreme Court in the United Mine Workers case.

And the injunction there was issued.

One other statute and I am through with that subject. The Labor-Management Relations Act of 1947, toward the end of it in Section 188, states specifically: "It shall be unlawful for any individual employed by the United States or any agency thereof including wholly-owned Government corporations to participate in any strike."

Consequently we contend that the threat of work stoppage, the threat of a strike, would be entirely illegal and would not enter into this picture. The balance of equities of the kind of stay, the kind of temporary injunction, that we are asking for, the balance of those equities clearly outweigh in favor of the plaintiff.

Now, may I devote just a few minutes to the consideration of the Government memorandum? It is an extensive document. They start with the proposition at page 7, if it appears the same in this brief as it was in the Youngstown brief. They contend the controlling principle is the balance of relative interests of the parties. Then they proceed to demolish that entirely by stating a few paragraphs later on that it is almost impossible to envisage a showing of the private interest which would prevail. And in the footnote they say that it would adversely affect the public interest and equitable relief will be denied.

Consequently they say that the balance of relative interest in every case where the Government asserts an adverse public interest, there can be no such thing as a preliminary injunction. They say our fears are all imaginary, in page 13 of the brief. That the Executive Order provides that there shall be no interference with management in the ordinary course of business and the financial operation of the seized plants; that the management shall continue their functions; that the managerial powers and beneficial interests in them have remained unchanged.

We say that they don't remain unchanged, for the rea-

sons we have already assigned in great detail in our chronological outline and in the affidavit of Mr. Stephens.

They treat the compulsory unionization of our shops very cavalierly at page 15 of their brief. They say in that connection:

"Plaintiffs' position with respect to the union shop is (a) that it is unnecessary since the union is firmly [fol. 1286] established in the steel industry and (b) that it is undemocratic to force an employee to join a union against his will."

Hence they draw the conclusion that:

"It appears that the question of the union shop, vital as it may be to the worker who does not wish to join a union is of little concern to the plaintiffs."

Contrast this, if Your Honor please, to that argument in the brief with the affidavit of Mr. Stephens in which he asserts unreservedly about a union shop and I now read from page 6 of his affidavit:

"Such action—" that is threatened action to do certain things—"Such action would also leave unresolved the demand of the Union for a Union Shop Provision. Such a provision would affect thousands of present employees who are not members of the Union, and such new employees as do not choose to join the Union, would impair the efficiency of plaintiff's entire operation, and would defeat plaintiff's traditional insistence upon freedom for its employees to choose whether or not to become Union members."

That is all washed aside with a wave of a hand that says that compulsory union shop problem is of no concern to [fol. 1287] this plaintiff.

Now they take quite some space in their brief to advance two other contentions that I would like to refer to very briefly. One is that under the Executive construction the powers that they claim in here in the Executive have been demonstrated by history. Most of the incidents that they cite concern steps taken during actual war. They point to one during the administration of President Theodore

Roosevelt, and then they insist that that shows in his memoirs or his writings he considered the power to be exactly what the Government is claiming the power is today.

But in this book, Corwin, *The President: Office and Powers*, a textbook that the Government refers to and cites as authority, at least four times in their brief, Professor Corwin makes this statement about President Theodore Roosevelt's views:

"One fact 'T. R.' omits to mention, and that is, that the Attorney General Knox advised him that his 'intended step' would be illegal and unconstitutional. For some reason the opinion is still buried among similar arcana of the Department of Justice."

Now they point to some of the acts taken by a later President, President Franklin D. Roosevelt, and there were [fol. 1288] some acts he took before Pearl Harbor that might be pointed to as indicating that they thought he had the power to do these things.

The answer to that is, as we see it, that if his acts were illegal, the fact that he took them doesn't make any precedent for a subsequent executive to do similar illegal acts. And those things that they cite in their brief were never tested in court, as this one is being tested here.

Now, so far as the legislative construction is concerned, they point out the numerous incidents of statements made in debates in Congress which Senators and Representatives made indicating that some of those legislators had the same idea about this indefinite and nebulous inherent power that the Government now presses on the Court.

The answer to that we think is extremely simple. We refer Your Honor to the Congressional Record that has been made since April 8th of 1952. There you will find a contemporaneous expression of the views of legislators on the subject of the power of the President and the power of the Secretary of Commerce to do what was done in this case.

Now, if the defendant's contention prevails before this Court and our application is here denied; we submit that inevitably and necessarily we come to a situation where [fol. 1289] it might be said that this is a Government

of men and not a Government of law; a situation where an Executive by his own fire can become a dictator and a tyrant; where there is every indication of the possibility of a despotic use of power, and the permanent loss of individual liberty and freedom.

In conclusion, I would like to read to Your Honor very briefly from the writing of President Madison and from the Lichter case these statements.

In the writings of President James Madison, he said with respect to the inherent powers theory, the one we are discussing:

"pregnant with inferences and consequences against which no ramparts in the Constitution could defend the public liberty or scarcely the forms of republican government * * * No citizen could any longer guess at the character of the government under which he lives; the most penetrating jurist would be unable to scan the extent of constructive prerogatives."

And in 1948 the Supreme Court in the Lichter case, 334 U. S., said this:

"In peace or in war it is essential that the Constitution be scrupulously obeyed, and particularly the respective branches of the Government keep within [fol. 1290] the powers assigned to each by the Constitution."

We think if your Honor believes we have demonstrated and made a showing, that the relief that we are seeking in our motion we are entitled to, and we ask your Honor to issue an order accordingly.

Oral presentation on behalf of Bethlehem Steel Company.

By Bruce Bromley, Esquire:

Mr. Bromley: May it please your Honor, when I appeared before Judge Holtzoff the other day I asked him to issue a temporary restraining order against the seizure. That is what I am asking today on this motion for temporary injunction. I wanted him to prevent the Secretary of Com-

merce from keeping our properties. That means I wanted them returned. That is what I want today.

But like many another lawyer, I also ask your Honor, that if for some reason which escapes me, you feel that should not be done, that you should alternatively enjoin the Secretary, imposing upon our employees terms and conditions of employment, the effect of which would be irreparably to destroy or at least impair our bargaining position in the future with our employees.

Now, the tremendous public interest which has been exhibited in the question of the extent of the President's power, I think, is a heartening thing. It shows that our citizens are alert and alive to their rights and responsibilities. But we do not need to indulge in a law school debate to solve the problem which is presented to Your [fol. 1291] Honor, because it is really a very simple one.

Chief Justice Hughes put it I thought beautifully when he said this:

"The constitutional question as to Presidential powers presented at a time of emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions."

Now, the President has some power. Emergency never creates power in anybody. It is but the occasion for the exercise of a power given by the Constitution. So it is impossible and unnecessary to envisage all the many emergencies which might face this nation, which might enable the President either as the Chief Executive or as the Commander-in-Chief in so doing.

We don't have to stop and philosophize about what would happen if an atom bomb were dropped on us. What we are confronted with is a labor dispute and threatened strike which would have serious effects, of course. A strike in almost any industry would have today.

Congress has passed a law, the Taft-Hartley Act, in which it has set forth the path to be followed to solve just such a dispute as this. The President has seen fit to disregard what the Congress has laid down for him to do, and has turned to what he says is his inherent power

to seize private property, a power which he might possess [fol. 1292] in some other set of circumstances, as Judge Hughes indicates, but which he certainly does not possess in this so-called emergency.

And that is why I thought Your Honor's inquiry to Mr. Kiendl was of great significance when you said: "Does the Taft-Hartley Act provide anything else after the 80-day period?"

Well, it does. It does provide for something else, and we can find it in Section 180.

To step back just a moment to remind Your Honor that after the 60-day period there is to be an election in each one of the plants of the affected industry under the supervision of the Labor Board, and the employees are given an opportunity by Section 179 of the Taft-Hartley Act to vote on the question.

One, to accept the final offer of settlement made by their employers. And after they have so voted and of course some of them might accept it, after they have voted and the results shall be certified to the Attorney General within a five-day period—the election takes fifteen days. Then the results must be certified within five days.

Then Section 180 comes into operation, and that provides, and it is a brief section:

"Upon certification of the results of such ballot or [fol. 1293] upon a settlement being reached, whichever happens sooner, the Attorney General shall move the Court to discharge the injunction—"

That is the Taft-Hartley Act injunction.

"—which motion shall then be granted and the injunction discharged. When such motion is granted the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry, and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action."

That is what the law says should be done.

What Senator Taft said about it on the floor of the Senate has fortunately been reproduced in Mr. Kiendl's brief, Section 3, page 4. Senator Taft said about that:

"We did not feel that we should put into the law as a part of the collective-bargaining machinery, an ultimate resort to compulsory arbitration, or to seizure, or to any other action. We feel that it would interfere with the whole process of collective bargaining. If such a remedy is available as a routine remedy, there will always be pressure to resort to it by whichever party thinks it will receive better treatment through [fol. 1294] such a process than it would receive in collective bargaining, and it will back out of collective bargaining. It will not make a bonafide attempt to settle if it thinks it will receive a better deal under the final arbitration which may be provided.

"We have felt that perhaps in the case of a general strike, or in the case of other serious strikes, after the termination of every possible effort to resolve the dispute, the remedy might be an emergency act by Congress for that particular purpose."

So I say to Your Honor that the Taft-Hartley Act does provide for something to be done after the 80 days. That statute is available today if Your Honor should give our properties back, and would stand as a bulwark against any so-called emergency. Now, I think Your Honor was right in your suggestion that you don't have to consider the question of irreparable damages, as I understand Your Honor, if this seizure is unlawful.

The Court: No; I said that I thought perhaps the law was that I didn't have to weigh the equities, balance the convenience and the injuries if it was an unwarranted exercise of purported power.

I think that is what I said.

Mr. Bromley: Precisely what you said, of course. (Yes; [fol. 1295] Your Honor. And I think that is entirely sound, and I don't propose to argue it further.

The Court: I don't know. I would like to hear you argue that. I want assistance on that.

Mr. Bromley: I think it is perfectly true that the seizure of the properties of a citizen, and the control and domina-

tion which must subsequently be exercised over them, necessarily, and the fact that our free right to manage our properties is interfered with, creates such a legal right of so serious a nature that without more, without a single added overt act, a court of equity is compelled to grant an injunction. And there is no question of weighing the inequities in the sense of a suit or an initial injunction in usual circumstances.

But I don't think Your Honor has to approach that problem and dispose of it because I think that it is now apparent since the Taft-Hartley law stands there for all to see and to be made use of by the President, that it is nonsense to say that the public would be disastrously affected in such fashion as to outweigh the invasion of our right of property, if you should return our properties, because there would be no strike, there would be no interruption of steel production, there would be no injury, because Taft-Hartley stands there as a bulwark of protection. But our rights and [fol. 1296] the serious invasion of our properties contrary enough to our fundamental law and our Constitution would be immediately remedied and protected.

Mr. Kiehl referred to the Congressional power which the Constitution grants in these circumstances, and I thought that it was always important to remember how broad the legislative powers are which are given to the Congress. And he omitted to refer to one phrase which seems to me, in this context, to be the most important of all, and that is Section 8 in Clause 18: "To make all orders which shall be necessary and proper for carrying its execution of the foregoing power,—" He read that to Your Honor, but that goes on:

—and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof."

That is what Congress has done. It has passed a law to carry into execution the power of its President or Chief Executive in this and similar economic and labor emergencies.

And under the Constitution, I submit, he is obliged to have recourse for that before he can pull himself up by his

own bootstraps and say: "I am confronted with an emergency. Why? Because I don't like the Taft-Hartley law."

I don't think any President can create any emergency [fol. 1297] in that fashion by a disregard of what Congress has seen fit to authorize, if not direct, him to do.

The Court: May I interrupt you there?

Mr. Bromley: Yes, sir.

The Court: As I hurriedly read the defendant's briefs, I gathered—if I am wrong I am sure counsel will correct me—that he did not depend upon any express statutory power, that he did not depend on any express constitutional power, but that he depended so far as power is concerned solely upon inherent power. I assume he means that to be the same as implied power.

Mr. Bromley: Yes, sir.

The Court: Now, my recollection is that the Supreme Court has held that Congress has certain implied powers, but they are limited to implementing express powers.

Do you have any authority on the implied powers, if any, of the President, and are they likewise so limited?

Mr. Bromley: I believe that Mr. Kiendl's brief establishes the affirmative of that proposition, that they are limited.

The Court: I didn't think he mentioned it.

Mr. Bromley: He did not; sir.

The Court: I will let him speak again if he will help me on that point.

Mr. Bromley: I think that question can be answered [fol. 1298] by referring to what Chief Justice Taft wrote in his book, that there were no residual powers—and the word residual or residuum occurs throughout Mr. Baldrige's brief—

The Court: You don't contend that Congress has no implied power?

Mr. Bromley: No, sir.

The Court: You contend the President has no implied power?

Mr. Bromley: I contend that he has no separate implied powers.

The Court: Then you think the criterion is the same as I am sure has been applied to Congress?

Mr. Bromley: I do; yes, sir.

The Court: That it is limited to implement those that are expressly given?

Mr. Bromley: Yes, I do.

And there is a section in Mr. Kiendl's brief which treats that, because the Government has said, "Oh, well, Chief Justice Taft withdrew that when he wrote a subsequent opinion in the Morris case." The brief points out whether he did or not. I think he did not.

There is a subsequent decision of the Supreme Court which says if he did he went too far.

I think the brief—I think we can find it in a moment—[fol. 1299] will demonstrate to Your Honor the correctness of the proposition which I have just asserted.

Now, there is only one other thing, and I am not sure this is at all appropriate. But Your Honor mentioned something about the price situation.

I want to make sure Your Honor understands that so far as the Capehart amendment is concerned, it is the position of the Government and of the O. P. S. specifically as follows:

"It should be noted that this amendment (Capehart amendment) became law long before the present dispute arose, and any price adjustments due under it are entirely apart from the present controversy."

So that in speaking about maintaining the status quo, I wanted to put in Your Honor's mind that the Capehart amendment and relief under it has no relation to the present dispute or any subsequent wage increases, and therefore no relation to the status quo.

The Court: That wouldn't compensate in part for the wages?

Mr. Bromley: Not the wages.

The Court: Why hasn't it been given to you before if you are entitled to it?

Mr. Bromley: Well, I don't understand why it hasn't been given to us. Maybe it is because we didn't ask for it. [fol. 1300] But it has not been taken advantage of. I think Mr. Stephens said it was because of the pendency of the negotiations.

The Court: Mr. Kiendl said that he wouldn't take advantage of it.

Mr. Bromley: Well, I don't think there is any present intention to take advantage of it. I don't know what that situation is, but I want to make it clear that it hasn't any relationship to the present controversy, any future wage increases.

The Court: But it would show good faith.

Mr. Bromley: Yes, yes, it might very well. Yes, your Honor.

The Court: That is important in equity.

Mr. Bromley: That is important in equity. And I stand with Mr. Kiendl in his position.

Mr. Baldrige: Would you permit an interruption, Mr. Bromley?

Mr. Bromley: Are you Mr. Baldrige? Certainly.

Mr. Baldrige: I think I might help the Court on that point.

It is my understanding that most of the steel companies had asked some time in November or December for a Capehart adjustment; that subsequent to the request they asked that Government action on it be held up until the outcome [fol. 1301] of the then wage negotiations was determined.

The Court: Thank you very much.

Mr. Bromley: That is right, sir. Nothing since has been done.

And now will your Honor hear Mr. Luther Day from Cleveland, for Republic?

Oral Presentation on Behalf of Republic Steel Corporation

By Luther Day, Esquire:

Mr. Day: If the Court please, I have canvassed the situation as to our position with associate counsel and what we are asking for as of this time.

We would like to have an injunction to enjoin the seizure, and we are asking for that on this application for preliminary judgment. But we want also, and particularly now, immediate relief preserving the status quo until we can have a hearing on the merits, and an answer is filed by the defendant in this case and the issues joined, which should not be at any very great late day.

Now, if your Honor believes that in passing on this application for preliminary injunction, you should consider and decide the ultimate question of the President's power in directing the Secretary of Commerce to seize our mills, or course, we believe—

The Court: How can I avoid it?

Mr. Day: Well, the only way—

The Court: That is the gravamen of your complaint.

[fol. 1302] Mr. Day: I don't think you can avoid it, but our position is that if Your Honor desires at this time to go into the ultimate question in this case, and to decide that this seizure was unlawful and without authority, then, of course, if Your Honor please, that would be all right with us. But what we are—

The Court: Don't we have to determine the legality or illegality of the seizure?

Mr. Day: I don't think so at this time, for this reason, as I understand the rules of law and procedure applicable here: If Your Honor reached the conclusion that there is a probable and discernible showing here of a lack of power upon the part of the President to issue the order, then you could grant the temporary injunction, preliminary injunction prayed for, to the extent of preserving the status quo pending the final determination of this case.

The Court: I see your point.

Mr. Day: I think the facts, if Your Honor please—

The Court: Well, on a hearing on the merits, what would be argued that isn't being argued today? Anything?

Mr. Day: I don't know.

When this matter was before Your Honor some weeks ago when we all came in, as Your Honor will recall, and asked that the case be advanced for immediate hearing, [fol. 1303] Your Honor said, and properly said, that it was not within your power to compel the filing of an answer by the defendant here until the answer day came by. And there was some discussion at that time whether the answer day was within 20 days or 60 days.

It would seem to me that the ultimate question before the Court on the hearing on the merits is the basic question presented at this time. And that is—

The Court: I feel the same way, but I have no power to compel the premature filing of an answer.

Mr. Day: We all recognize that. I think we were more or less helpful at that time, that our property having been seized by the Secretary of Commerce, we think acting as an individual, but however that may be, by order of the President, when we came into court and challenged the validity of that order and challenged the authority and power, and I might say right, of the President to issue that order, perhaps we were a little too hopeful that the defendant and his counsel might be willing to have that litigated at that time. But they did not see fit to do so.

Now we come before this Court on this application for preliminary injunction. I am not going into the damages that will happen to us because that has already been discussed. I will say it is about the same with regard to [fol. 1304] Republic as stated here with regard to the United States Steel Corporation, although Republic is not a large corporation as is U. S. Steel Corporation.

The nature of the damage, the questions with relation to the irreparable injury, they are about the same. So if Your Honor wishes at this time to consider the merits, that is perhaps not the ultimate merits, because you can't do that on this application for preliminary injunction, but to consider at this time the question as to whether or not the President had any power or right or authority to issue the order, very well and good. But we do not have to ask Your Honor to do that at this time because if we make—

The Court: Well, I have been doing it for two hours and a half.

Mr. Day: If we make a showing here that there will be irreparable loss and damage and a probable showing that the Secretary of Commerce, the defendant here, whether he be an individual or otherwise, we say he is an individual and is acting clearly without power, we are entitled at this time in any event in representing the least relief which we can ask, to an injunction preserving the status quo pending the final determination of this case.

Now, if Your Honor please, there are a great many plaintiffs before this Court. And what Mr. Kiehl has said [fol. 1305] speaking in behalf of the steel corporations has application to Republic's case.

There are a great many counsel who are already scheduled to address Your Honor after I am through.

The legal questions are presented on briefs filed by the two sides.

I appreciate the opportunity of saying anything at this time.

I am not going to discuss the case generally. I am not going to talk about in many of its phases, but I think I would be derelict in my duty to my client, Republic Steel Corporation, if I did not challenge at the first opportunity presented to counsel the power and the authority of the President of the United States to issue the authority he did issue to Mr. Sawyer.

I wish in the short time I am going to take to call Your Honor's attention to what that order is, and what it means. The order was issued by the President to the Secretary of Commerce, so far as Republic was concerned, to seize Republic's properties.

After the seizure had been accomplished, as it has, for the Secretary to operate the plant in the various respects set forth in the order.

We challenge—I would rather say we assert here. I don't like to say challenge. We assert here that the President [fol. 1306] had no power to issue that order. We have examined into the position of counsel for the defendant, the representatives of the Department of Justice, to try to ascertain upon what basis and legal principle they claim that that power exists.

They say they are not making the claim that the power exists upon the basis of some broad inherent power. They are not claiming that. They say that the President has a residuum of inherent power outside of the express provisions of the Constitution.

In other words, they are not claiming, as I understand it, that the President possesses all the powers or any powers unexpressed and unprovided for in the Constitution, powers which it might be said were in the people, in the Government as a whole, but they are basing their claim upon the ground that the President has this power either as Chief Executive or as Commander-in-Chief, or upon the basis of some other power provision in the Constitution conferring express power upon him.

I am not going to take the time to argue at this juncture of the case whether or not there is any basis for those contentions. I think there is none. I think Mr. Kiendl has very clearly pointed out, and I think the briefs clearly demonstrate, and the decisions to which those briefs refer, that there is nothing in the power of the President or the [fol. 1307] Chief Executive or as Commander-in-Chief of the Army and the Navy, in the situation here disclosed which would give him the power to ~~seize~~ our property.

The contention of the defendant here seems to be that the President has powers that they seek to ascribe to him, regardless of any action by Congress, regardless, as I understand the contention, whether Congress has acted or sees fit to act with relation to the matters herein involved. In other words, that the President as Chief Executive or as Commander-in-Chief of the Army and the Navy, has the power that they are seeking to have endorsed here judicially by this Court, altogether ~~regardless~~ of what Congress may see fit to do in the premises.

The Court: Is that a good place for you to stop?

Mr. Day: It is; yes. But I am going to get through in a very few minutes.

The Court: This is the usual time we recess for lunch, so we will recess now until 1:45.

(Thereupon a recess was had until 1:45 o'clock p.m., this date.)

[fol. 1308]

After Recess

(Pursuant to the recess heretofore taken, the consideration of the above-entitled matter was resumed at 1:45 o'clock p.m., this date, when the following occurred:)

The Court: You may proceed, Mr. Day.

Mr. Day: If the Court please, at the adjournment time I was trying to point out that the claim of the defendant here advanced by the Department of Justice as to the power and the authority of the President to act in a situation of the character here disclosed is so broad that there is nothing that Congress can do to diminish it in any way.

I now want to call attention to another claim which, as I understand the memorandum of the Department, is

made in behalf of the defendant Secretary Sawyer. It is to the effect that the finding of the President that such an emergency exists here as calls upon him to act and empower him to act by seizing the mills, is final and not subject to judicial examination or review.

On Page 59 of their brief they say:

"This is a finding of serious emergency. Abundantly supported by the facts, it is certainly all the finding that could be required to sustain the exercise of the President's power in the nature of imminent domain. And, we submit, it is a finding which is not [fol. 1309] subject to judicial review." Citing cases.

So that the defendant here through the Department of Justice is claiming such a broad power, such an uncontrollable power, in the President, and the situation here presented that we cannot find in any of the cases a precedent for it. If the President upon a finding that he makes as is set forth in his order to the Secretary of Commerce, decides that a situation is presented which calls upon him for the public safety on behalf of the war effort or defense effort, because there is no war now, to seize our mills, if they are right, we are almost powerless in this situation.

The one thing that prompted me, if I may say so, your Honor, to speak at this time is that claim that is made by our distinguished adversaries is the sweeping effect of it pursuant to that interpretation of his power.

The President has issued an order to the Secretary of Commerce seizing a large portion, the important portion of the steel industry, one of our leading industries. If he can do that with relation to steel, and there is no way to question it, there is no way to control it, it is not difficult to see or predict that he seize almost any other industry. He can seize oil. He can seize coal. He can seize any other important industry, as he has seized the steel industry.

Well, it is suggested here and probably will be contemplated [fol. 1310] that the President's action in seizing the steel mills should not be carried out without compensation being paid to the owners of the steel mills for the property taken. But I respectfully submit that does not meet the situation, does not answer the question, because if the power

here sought to be exercised does not exist, if the fact if it can't be found in the Constitution, and there are no statutes except in the Taft-Hartley Act that bear upon it, the fact that it is intended that compensation be given to the owners of the steel mills for their property taken, might be an incident to the exercise of power, but it can't create the power if it doesn't otherwise exist.

That is our contention upon that provision.

Now it seems to me that this Court is asked to go a very long way in the request for a holding that the President of the United States can thus seize the steel mills of this great industry upon his own finding and determination that such action is necessary in the public defense, and predicate that contention upon the very narrow—and we think not sustainable grounds—that he can do that in the exercise either of his executive powers as Chief Executive or as Commander-in-Chief of the Army and the Navy. I respectfully submit, if your Honor please, that such a doctrine, without enlarging upon it at this time in my argument, is opposed to the whole philosophy of the American Nation, [fol. 1311] of our Constitution. It is opposed to the deep down bedrock foundation upon which this Government was created; and that such a doctrine should not be declared to be the law in this case in response to the arguments made here which we believe are without any substantial foundation.

I think that is all I care to say—I am not going to discuss the Taft-Hartley Act. That has been done by the counsel who preceded me—except to say that it appears to me, as it appears to them, that here is a remedy provided by an Act of Congress directly applicable here that meets the situation.

In determining whether or not the President has the powers contended for by the Department, and whether or not this Court will by what we concede to be a strained construction, hold that the power existed under the provisions of the Constitution which they point to, I think your Honor may very well bear in mind—if I may humbly suggest it—that there is an Act of Congress that does apply here, and there is no occasion to so greatly extend the powers of the President in a situation where Congress has acted with relation to it.

So we believe, if your Honor please, that on behalf of Republic, this motion for preliminary injunction should be granted.

[fol. 1312] If your Honor is convinced—and I say it once more in conclusion—if your Honor is convinced that the action of the President in that respect here involved is clearly unlawful, then your Honor undoubtedly, if he sees fit so to do, will grant an injunction, a far sweeping injunction.

If on the other hand there appears to your Honor to be as we submit it must clearly appear, that there is a serious doubt as to the power of the President, your Honor may grant the preliminary injunction preserving the status quo.

I want to once more thank your Honor for listening to me.

The Court: You are quite welcome, Mr. Day.

I would like to ask one question that occurred to me in connection with your discussion of the subject of just compensation.

As I understood you, you took the position that there never could be an exercise of eminent domain unless it was a conventional exercise of eminent domain. Haven't there been occasions when there has been, what I determine an "informal exercise" of eminent domain?

Mr. Day: I think there have. I think there have. I don't think they are under situations as to facts at all akin to that here presented.

The point I was trying to make was—

The Court: You regard this then as not an exercise of [fol. 1313] eminent domain?

Mr. Day: That is right.

And I say, with all due respect to the contentions of the Department, that if the power to seize our steel mills is not vested in the President by the Constitution, and if no Act of Congress except the Taft-Hartley Act which does not have application they cannot enlarge the power of the President or justify the exercise of that power by saying that if it is improperly or illegally exercised we have no right to object because we will be compensated.

I just wanted to say to the Court that Mr. Charles Tuttle of New York will now address the Court in behalf of the Armco Steel Corporation.

We kind of agreed among ourselves that as each one of us gets through he presents the next one to the Court.

The Court: Very well.

Mr. Tuttle: Thank you very much, Mr. Day.

The Court: It is unnecessary. I have encountered Mr. Tuttle before.

Oral Presentation on Behalf of Armco Steel Corporation.

By Charles Tuttle, Esquire:

Mr. Tuttle: I appreciate the importance of endeavoring to avoid repetition in every way possible and, above all, to be brief.

I will, therefore, with your permission, address myself [fol. 1314] to certain statements and claims in the Attorney General's brief here, which it seems to me bring out into clear relief several statements that are vital to this case. When I have done that I will have concluded.

In the first place, the brief for the Department of Justice states what it concedes to be the principle which at this time your Honor should guard yourself by in determining these motions.

It does so at Page 16; and there in the first paragraph it says:

"An essential part of the right to interlocutory relief must consist of some kind of showing or assurance to the court that the parties seeking the relief have a fair chance of prevailing on final hearing and are, accordingly, entitled to interim protection."

The ensuing sentence states in somewhat similar phraseology the same thing, to-wit: Is there a showing of substantial possibility of obtaining final equity intervention in favor of the plaintiffs.

It was with that in mind that I made the statement in response to your Honor's request as to what was the position here of the corporations that I represent, because I do conceive that the basic claim in our complaint, that the seizure itself is illegal, is part of the consideration which [fol. 1315] your Honor will give to this case in determining

whether in the light of what is said here in the Department's brief, these plaintiffs are entitled to interim protection at the least. Certainly against any further enlargement of the seizure, the invoking of additional and further powers which can still further change the situation.

Now the issue much discussed in the Attorney General's brief turns on the phrase which is repeated time and time again, but I venture to believe not defined or at least not adequately defined, the phrase "residual power".

The question necessarily comes judicially therefore: Residual power in what field? The Constitution itself, even before its amendments, provided in so many words that the Constitution and the laws of the United States enacted in pursuance thereof, shall be the Supreme law of the land.

The question necessarily comes therefore when we are discussing this rather entrancing phrase, a metaphorical phrase, which does not appear in the Constitution itself in any form, shape or manner—we should be asking the Department to tell us in what field is this residual power. Is it a residual power solely in the field of administration? In the administrative matters the President may have from his powers delegated to him by the Constitution to administer the laws, certain incidental or implied powers that go with it, and which are essential to administering the laws.

If they mean by that not so much residuum power, because that phrase is decidedly, I believe, elastic—if they mean by that merely "implied power" in the field of the executive, then that would be a different proposition. But I don't find any statement in the brief of the Department of Justice where they are substituting the phrase "implied power" for their chosen phraseology of "residium power".

Now, let us see, if I may, what light their own brief shows on what they mean by "residium power". I think the explanation can be best brought into focus, at least initially, by turning to Page 28 of their brief where they said that a certain statement by President Taft—than whom probably there was no more great constitutional jurist in our history—they take issue with his statement.

He is dealing there with implied power. He says the power that the President exercises must be "either in the

Federal Constitution or in an act of Congress passed in pursuance thereof."

That must be so, because where it is otherwise, then the phrase "due process of law" would not have the settled meaning that it has.

[fol. 1317] It is merely the Constitution and laws passed in pursuance thereof. That is the only thing that we have of "due process of law".

There isn't any such thing in the Federal Courts as "due process of law" outside of the Constitution and the laws passed in pursuance thereof.

Now, consequently, the President has no power to create law. But they say he has some kind of mysterious undefined power when it comes to the field of general welfare.

You will find that on Page 29, where in contrast to what Chief Justice Taft said in his analytical book on the Powers of the Chief Magistrate, they turned to one who was not a lawyer, but a very vigorous and forward going President of the United States whose slogan was "big stick". They say there, they adopt the position there—this is what they mean by "residium power".—We now get it.

It is on Page 28. President Theodore Roosevelt said:

"My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws."

Now, we have been accustomed as Americans to regard the Federal Government, whether it is the President or the Congress or the judiciary, as having no power at all except [fol. 1318] what is delegated to them by the Constitution and the laws passed in pursuance thereof, because the Constitution itself states that all other powers whatsoever not thus delegated are reserved to the states or to the people.

In consequence it has become axiomatic that the Federal Government is solely a Government of delegated powers, deriving its just authority to that extent from the consent of the Government. There is no other expression of consent of the Government.

Now here we have it turned around that the President may do anything that he thinks the needs of the Nation demands unless there is a prohibition in the Constitution.

In other words, instead of delegated power, you have absolute power subject to stated restrictions, if you can find them.

I think that upsets the entire theory of American Constitutional liberty, and turns our Government into a Government by edict, by some benevolent man, who feels that he may do whatever is necessary to promote the needs of the people as a whole. If there could be any doubt of that, as to the meaning of "residium power" that they are talking about, not residium implied power in the field of administration, but rather in the field of the general welfare, then their [fol. 1319] next quotation on the top of the next page, Page 29, clinches it.

"In other words," says Theodore Roosevelt,

"I acted for the public welfare, I acted for the common well-being of all our people, whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition."

Now, our friends in the Department of Justice are trying to turn that expression into an expression of Constitutional law. They are proposing an amendment to the Constitution of the United States to put that language into it either expressly or by implication. They are asking your Honor to assist them in so doing.

Now, what do they say about the Chief Justice's expression where he defined the implied powers of the President as one which must flow from express delegated power and incidental to its exercise. They say that that was all taken back by Chief Justice Taft in the Myers case which they discuss on Page 29. (Myers vs. United States, 272 U. S. 52). Now, in the Myers case we had a very simple issue of Constitutional law and implied power. The President appointed an official who had been appointed with the advice and consent of the Senate. Subsequently to his appointment he turned out to be unfit in the mind of the President of the [fol. 1320] United States on who rested the chief responsibility of proper administration. The only question was whether the President could discharge that man without getting the advice and consent of the Senate. Chief Justice Taft held that that was a pure case of implied power, not

residual power but implied power, in the first place, because he was the appointing power. When he came to the conclusion that the man he appointed wasn't fit, he could discharge him by necessary implication, and second, because he had the responsibility for the administration. Since he had the responsibility for the administration, he had a right to have assistants who would carry forward according to his ideas of what was honorable and proper administration.

So in that Myers case we have a statement by Chief Justice Taft which not only takes back nothing, but in my judgment takes the whole foundation from under their argument. They have quoted it in their own brief. I read it:

"Our conclusion on the merits, sustained by the arguments before stated, is that Article II grants to the President the executive power of the Government; i.e.,"

namely—a definition by the Supreme Court of the United States, unanimously, I believe, if I recall it correctly.

[fol. 1321] "—the general administrative control of those executing the laws,"

Administrative control. Not to do anything and everything that he might deem which is for the public good.

Now they say right under that:

"Elsewhere in his opinion, the Chief Justice stated that the specific enumeration of the legislative power as contrasted with the general grant of executive power revealed an intention to repose a residual power in the President."

There is no such language in the opinion. They were talking about "implied", what was implied in the appointing power that was granted by the Constitution.

But we have more explanatory of that, if your Honor will look at Page 29 of the Government's brief. You will see there in the third sentence from the bottom this statement:

"The suggestion that the judiciary will use the force of an injunction to restrain the President in

action which he believes to be necessary to the welfare of the nation is in itself rather startling."

If such a power was stated in the Constitution his judgment might be entitled to great weight. But we show in the cases that we have in our brief that it still remains a judicial question because the judicial power of *of* the United [fol. 1322] States is expressly one to handle all cases arising under the Constitution and laws of the United States. And the only liberty we can have for long in this country lies necessarily in an independent and fearless judiciary which knows when the bounds of the Constitution are overstepped either by a powerful Executive or by a powerful Congress.

The judiciary has had no hesitancy under the phrase which I have just quoted as the supreme law of the land, in determining that the Acts of Congress, no matter whether unanimously passed, are violative of the supreme law of the land and are therefore void.

Is the Executive exempt from the same principle?

Are the Courts more impotent in the preservation of the Constitution when the invasion comes from the Executive than when it comes from the legislature?

So I say it would be startling—it would indeed be startling to use ~~their~~ language—if the judiciary did not feel that it would preserve the Constitution where the President through his subordinates was taking action for which there was no Constitutional authority.

But in addition we have Page 27 of their brief in their footnote.

[fol. 1323] May I call attention to the footnote—the footnote is:

"It should be noted that we do not contend that the President has a residuum of powers." Not "implied powers," but again "residuum"—"—outside of the Constitution inherent in his position as Chief of State,—"

Now I pause to say that here is another phrase which isn't in the Constitution. We have "residuum powers" in the field of public welfare and general need. Now we

have a phrase which has had connotations in other countries with most unfortunate and disastrous consequences.

"The Chief of State"—I don't know where that comes from in the United States Constitution. I don't understand that anybody is recognized as a "Chief of State." A man is recognized as under obligation to execute and administer the laws of the land, but not to be over the American people as Chief of State.

And that is in the Attorney General's own brief.

I go on:

"—as Plaintiffs would have this Court believe our position to be. We contend only that he has such powers under the Constitution and concede that his actions are subject to constitutional limitations. In the instant case, the applicable limitation is that just [fol. 1324] compensation be paid for the taking of the plaintiffs' properties in accordance with the mandate of the Fifth Amendment."

Now they are in effect saying there that the Bill of Rights so far as the residual powers of the President as Chief of State are concerned leaves a citizen with no remedy in the courts except to get compensation for the taking of its property.

In what Your Honor referred to a moment ago as the conventional exercise of the power of eminent domain, that power is exercised lawfully, and you get compensation because subject to compensation the Government can through and under constitutional circumstances take property if it proceeds lawfully and within the Constitution. But it is another question if the Government is not proceeding lawfully. When I say "the Government" I mean some public official is not proceeding lawfully. It is a very grave question whether there is any law at all which permits the citizen, where there is an unlawful taking of the property, to recover damages.

But the issue goes much further than that because that clause about taking property subject to compensation is preceded by another clause equally applicable and equally part of the Bill of Rights that "neither liberty nor property shall be taken without due process of law."

[fol. 1325] Now they say that "due process of law" is merely what the President thinks it is in the public good. That is their interpretation of this.

But we go further. The Bill of Rights has many protections to the individual citizen, both in liberty and property, rights which are essential to the preservation of liberty as a whole.

How far is this residual power to go in relation to all of the other Bill of Rights if it can override the two that I have just quoted and make them subject to the individual judgment of a single man, who by exercising that judgment creates due process of law ipso facto and ousts the court of injunctive power to protect man of his Bill of Rights and shrows him over to a doubtful privilege of going to some court, if he can find one, where he can get a judgment for money.

The rights in the Bill of Rights were never put there for the purpose of having a monetary evaluation. Never! The Founding Fathers were not putting a money price on the liberties that they were putting in the Bill of Rights. And to have that now suggested in the Department of Justice's brief at the footnote here is indeed startling.

It would be more startling in view of their further contention which Mr. Day has referred to so movingly that you can't even get money because the President's determination that there is a public need for his doing what he is doing in the exercise of residual power closes the courts out.

Now, where does the Constitution of the United States put the power of general welfare and common defense? I know that Your Honor is familiar with the fact that those two phrases first appear in the preamble.

"We the people of the United States in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

Now, it would have been surprising if after that preamble there weren't some statement in the Constitution where

those powers to preserve those objectives would be as a result of delegation from the states and the people.

We find those two phrases reproduced precisely in Section 8 of Article I:

"The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States;"—

Now, the preamble is adverted into a delegation of power and it is in Congress, the representatives of the people.

[fol. 1327]—If there could be the slightest doubt about that, the same section which states that in its first sentence, echoes it in its last because it says in the last sentence that the Congress shall make or have power to make all laws which shall be necessary and proper.

There is where the determination is. There is where the body and power to decide what is in the common welfare and for the common defense resides.

It says:

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

There is where the residual power—if I could use that term, although the Constitution doesn't—places the matter of common defense and the general welfare.

Now, as has been pointed out already, the Attorney General's brief significantly fails to refer to any enactment of Congress as authorizing what has occurred. Much less as authorizing what is supposed to be added what has occurred, namely the power to take away from these companies the power of collective bargaining, to enforce what originally was a mere voluntary procedure subject to the [fol. 1328] recommendations, to be subject to acceptance, and to turn it all into compulsory arbitration.

I don't think any secret is made at all—I don't think that will be made by Mr. Baldridge—that that is the next step.

Under those circumstances, just briefly in closing, I want to call to Your Honor's attention what the Supreme Court of the United States has said on this subject.

"The general power which is given to the Executive is to execute the law. He can't create the laws. He can only execute them. The word 'execute' is a simple word. In the process of executing the laws he may have in addition to what is enumerated in Sections 2 and 3 of Article II as to certain specific powers, he may have implied powers which those powers, including the one to execute the laws necessarily imposed on him, because he can't personally tend to the vast administrative business of the United States.

This language must not be lost sight of

The Court: What are you reading from?

Mr. Tuttle: What I am going to read here is *Home Building and Loan Association v. Blaisdell*, 290 U. S. 398. If this language is not upheld, and received in all its integrity, then our whole system of government is changed [fol. 1329] and we have a government by "Chief of State."

Chief Justice Hughes, I suppose one of the greatest constitutional lawyers along with Chief Justice Taft, the country has ever seen, said:

"Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved."

I have cited in our brief a number of cases that have implied that even against the Chief Executives of various States calling out the military under certain circumstances to seize property and to impose burdens, and all in the name of the general welfare of the state.

The Supreme Court has repudiated that concept and has said that there remains power in the judiciary as an independent arm of the Government to determine judicially whether, first, the power existed at all; and second, whether the circumstances under which it is exercised have been lawful.

The judiciary has both powers and must have it unless we are to go the way of other nations that have recently gone, when an independent judiciary was overthrown and the executive broke through into a dictatorship.

In consequence I say that if you find the power is exercised honestly within the limits of that power, it may not [fol. 1330] be subject to the judiciary review. There is nothing magic about that because that is the same with an order of an administrative officer, the humblest of administrative officers. If he has that power and exercises it according to his discretion, then the courts wouldn't interfere with that even though he is the humblest of all.

But does the situation change if the administrative officer is the top of them all?

Now, Your Honor, just this.

A residual power to take care of the general interests of the people of the United States just knows no limits. There are no limits. Everything that happens in this country concerns the welfare of the United States in one way or the other if it has an importance at all and not a private matter. Are those all within the residual consideration of the President of the United States? Are all of the Bill of Rights subject to that unexpressed power?

Why suppose, just for example—and I needn't cite any others—suppose the President of the United States should come to the conclusion that it was in the general interest to seize all the means of communicating thought, the radio stations, the television stations and all that. He thought that what was going over them was not conducive to the [fol. 1331] common defense or to the general welfare. No law on the subject, no statute on the books. He just thinks somebody else should be better, and he thinks this is an emergency, and so he declares that for the time being he should take over those means of communication.

Now, there is only one article of the Bill of Rights that the President can suspend, and that is habeas corpus, and he can suspend that only because he is given that power in time of rebellion and insurrection. But now we are suspending other Bills of Rights under the magic of abracadabra of residual power.

I think this question of the basic right to seize, which is one of the basic propositions in our complaint, is an inevi-

table part of the question of whether there should be interim protection.

I think this has been mentioned, but I want to mention it in closing.

At the present minute if this Executive Order means anything, it means that the persons engaged in these mills are now employees of the United States. We get our orders from the "boss," and that boss is not chosen by our stockholders or by the general directors, nor are the employees any longer subject to the direction of the stockholders or general directors except by grace of the order which directs [fol. 1332] that they continue—grace which can be changed.

The United States Government isn't paying its employees. The pay is being taken out. If it is increased it will be taken out of the moneys of the stockholders and out of their profits.

What is more intangible—the right of collective bargaining, which is certainly one of the basic Bill of Rights—that is where it is derived from—it has been a fundamental policy of this nation for the last quarter of a century if not longer—is taken away from them. It is handed out to a Government official, the defendant in this case, who makes the bargain, and then makes the stockholders and the corporation make good on it and lose forever the right of an equal dealing across the table with their own employees.

If that should be declared illegal, then going on to the next step doesn't mean a strike, because Section 188 of the Taft-Hartley law states in so many words that employees of the United States cannot strike against the Government. That is a privilege withdrawn. It is the same way in pretty nearly every state. The State of New York makes it a criminal offense to do it. People don't have to get into that employment if they don't want to. But after they are in it their relation is such to the public good that [fol. 1333] they can't strike.

I thank you, Your Honor.

It is my privilege to introduce to Your Honor Mr. Bane for Jones & Laughlin Steel Corporation.

Oral Presentation on Behalf of Jones & Laughlin Steel Corporation by John C. Bane, Jr., Esquire

Mr. Bane: If it please the Court, I will be just as brief as I can.

I recognize that it is hard for a lawyer like me to speak on constitutional questions after such a gentleman as Mr. Tuttle and the rest of the others here have spoken on that subject. Yesterday I had a similar misfortune when discussing labor matters before the Senate Committee, because Mr. Murray, representing the Unions is also a forceful speaker.

The case before your Honor has been thoroughly covered in all but a few *few* details. If I contribute anything it will be in the way of an endeavor to simplify one or two points:

Jones & Laughlin Steel Corporation, my client, brought suit against Charles Sawyer, individually. The fact that he is Secretary of Commerce and therefore a high officer of the Government is an accident. In our view of the law, and so far as the averments of the complaint are concerned, [fol. 1334] he is a trespasser for, as you know, in spite of the good intentions of such men as Mr. Sawyer, if he has seized our plant or threatened to seize our plant, as he has, without proper authority in law, as we assert he has, he is a trespasser and is personally liable to us for any injury done us and unquestionably is subject to the injunction of the court and the Court would require him to cease and desist entirely from any proceeding under the Executive Order.

The fact that equity has jurisdiction, and a rule of law as to balances of such equities, are matters that have been decided in the case of *Land vs. Dollar*, in the Supreme Court at 330 U. S., which has been referred to previously and which is referred to and cited at Page 11 of the brief handed to your Honor, and I will take just one moment to read a relevant passage from it. What the Court said there was this:

“ * * * But public officials may become tortfeasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's

realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld."

[fol. 1335] I think that that answers your Honor's question.

I think that that answers the question that you put this morning, a question that has been not answered until now. That answers the complete question, first, whether the Court has jurisdiction in equity and, second, the need for balancing equities between Government and citizen, and, third, possible remedy, in the Court of Claims or some other court, and by means of the Federal Torts Act.

That case, the case of *Land vs. Dollar*, decides each of those three questions in favor of my client. It answers those questions in this wise:

First, we have a remedy in equity;

Second, we are not deprived of that remedy, and

Third, a trespasser has no equity on his side.

Therefore, the equities, under the law, are on our side completely, and there is nothing to balance.

The conclusion to come to is, if you are satisfied as a matter of law that the individual we have sued is not lawfully empowered—not the Secretary of Commerce, but the individual—then, there is no question of balancing the equities and there is no occasion for waiting for trial on the merits, so there would be no doubt about the facts.

I do not think there is any doubt at all in this case.

Our bill is verified and the Constitution needs no verification and there is nothing in the counter affidavit that changes anything that we are relying on—the affidavits merely state that Mr. Sawyer was faced by an emergency.

Mr. Sawyer is a trespasser under the rule of law we are relying on, unless the Executive Order was warranted by the Constitution or by a statute, and since nowhere is there any statute, reliance must be had on the Constitution. The absence of any color or justification that this can be justi-

fied under the "Commander in Chief" power has been covered and, I understand, is not seriously urged by Mr. Sawyer; he has not urged that the seizure could be justified as the act of the Commander in Chief.

That, then, leaves only the remainder, your Honor:

"... he shall take care that the laws be faithfully executed,"

I will not duplicate the fine argument of Mr. Tuttle or the arguments of the other equally fine men who preceded me, but I would like to call your Honor's attention to one thing that has not been covered;

Under the decisions there are no inherent powers. We cite that here in our brief.

Under the decisions, in any field of Government or in any field of constitutional interpretation, there are only express powers and express powers, powers necessarily [fol. 1227] implicit from the grant of express powers, whether from acts of the Congress or acts otherwise expressly taken, and it is our understanding under the law and the cases that the President cannot, even in emergency, invade a field where Government is vested by anything save the Constitution or the Act of Congress.

Here the Government is attempting to do what it seeks to do in, it says, an effort to support the Army in Korea. There are two things that I would like to say in respect to that:

The power to seize property for such purposes is vested in Congress. The Supreme Court has held that in the case of United States vs. Bethlehem Steel Corporation, 315 U. S. 289.

Secondly, the power to raise and maintain an Army is specifically vested in Congress under Article I, Section 8 of the Constitution.

You have heard from several gentlemen here that Congress already acted to protect the people against the possibility of industrial strife, such as has been spoken of as being threatened here, and you have been told that that can be done through the Taft-Hartley Act which is expressly designed for that purpose.

◊ The President has chosen this means which we are combatting for some reason of policy appealing to him—it may be a good one. So far as I know he may be right. I won't argue that. I doubt it; but, what has the President done in this so-called emergency? He has chosen to reject the path laid down by the Congress and take a road of his own choosing, warranted by nothing in the Constitution or in the statute, and I suggest that the President cannot do that without destroying any semblance of the administration of justice or without ignoring expressly the provisions made by the Congress.

The situation has developed itself to a point where it is to my mind the same as if Congress sent the Army to Korea and, under Section 1 of the Constitution determined to maintain it by levelling a tax on one kind of property. The President, under his duty of seeing that the Army got to Korea, would go that far, but, being not satisfied with the tax that Congress levied against the particular kind of property, made no effort to enforce the tax and then, with the Army in Korea, he has no money to take care of it, and then excuses himself by reference to an emergency and, under that guise, he levies a brand new tax on some other property.

The illustration is so absurd that I do not think that any court would harbor it for a moment. It would amount to a question of the President seizing the property of any citizen in an effort to collect a tax levied by "Presidential [fol. 1339] discretion", and that is what you have here.

The President can say: I could have used the Taft-Hartley Act, but I did not.

But, the duty to determine what plants shall be seized belongs to Congress.

The President can say: I could have used the Taft-Hartley Act but I did not; but he decided to use another way.

Yet, in 1947, Congress made a choice of the means by which the President might handle a situation such as the recent threat of the steel strike. Congress having made its choice, the President is limited in his action to the following of that choice. But, the President said: "I will find a means of my own, and I will seize the steel companies, and the men will go on working."

That is Government by executive decree, without any particular limit on it, and it is nothing less than Government by a "Chief of State", or whatever you want to call it—there is nothing that finds itself in our Constitution, and our Constitution never contemplated any such kind of Government, and certainly no intelligent thought has been had on any such kind of government, and it is not, as I stated, contemplated by the Constitution of the United States.

For that reason I urge on you, as I understand from the [fol. 1340] other attorneys they have urged on you, that you grant the injunction prayed for.

The Court: You have indicated that you only asked for limited relief.

Is that so?

Mr. Bane: No, sir; we are asking for complete relief.

The Court: Who was it said that he wanted only limited relief at this time?

Mr. Bane: I think it was Mr. Kiendl who said that he would be content with that at the moment.

The Court: And do you not agree with him?

Mr. Bane: Well, I do not.

If you do not grant the full injunction, the same consideration that I have presented will apply to the grant of an injunction or the status quo to exist until the final hearing.

The next speaker that I will present will be Mr. John J. Wilson a member of this Bar and well known, I know, to this Court.

The Court: Yes.

[fol. 1341] Oral Presentation on Behalf of the Youngstown Sheet and Tube Company and the Youngstown Metal Products Company by John J. Wilson, Esquire

Mr. Wilson: If your Honor please, I would like to speak for a few moments on a subject that comes within the same sphere upon which Mr. Tuttle touched. I would like to discuss several of the other cases on which the Government seems to rely.

I realize that your Honor, as a lawyer, is going to deal with this problem from a lawyer's point of view.

The citation of a half a dozen or of a dozen instances where Presidents in the past have possibly usurped power to make seizures are no precedents on which this Court can rely to determine the situation presented to you.

The Court: You need not argue that.

Mr. Wilson: I take it that you would not want me to argue that.

Also, I take it, that the observations of members of Congress, in the halls of Congress, saying that the President already had the power not binding upon your Honor and, perhaps, not in the least persuasive.

So, I come directly to the pronouncements of the Supreme Court on this instant subject, and, even at this late hour, I want to discuss in some minute detail some of these [fol. 1342] decisions:

I want to start with an analysis of article II of the Constitution itself, because I definitely adhere to the precept that there are no inherent powers in the President definitely assert the proposition that that is what the Government relies upon in this situation.

I think, as Mr. Tuttle does, that Chief Justice Taft, in the Myers case, was proceeding solely and entirely on the basis of implied powers, a doctrine that is well recognized and has been well received by the Courts for years. But, as Mr. Tuttle and others have pointed out, there is not the slightest doubt that the Government in this case is arguing for some residuum of power, not on the basis of implication but on the basis of ~~inherency~~.

Having that in mind, I will attempt to analyze Article II of the Constitution.

You will recall that the first section of the Constitution says that:

"The Executive power shall be vested in a President of the United States."

Then, when we come to Section 2, we find that:

"The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several states when called into the actual service of the United States;"

[fol. 1343] and that:

" . . . he may require the opinion, in writing, of the principal officer in each of the executive departments",

that is, he may require departments to issue opinions on subjects.

We find that the President, under Section 2, shall have the power to make treaties, to appoint ambassadors, and shall have power to make recess appointments. In Section 2 we find only one thing that can possibly be invoked, and it has been invoked, and it has been discussed by Mr. Kiendl and those who followed him, and it is something that cannot be availed of in this situation, and that is the "Commander in Chief" clause.

But, there is nothing else remedial stated in Section 2 from which, even by the slightest implication, the power to seize a plantain this kind of a case arises.

Then we come to Section 3 of article II of the Constitution:

The President is supposed to make reports to Congress and to recommend such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall [fol. 1344] think proper; and he shall receive ambassadors and other public ministers; and he shall take care that the laws be faithfully executed, and shall commission all officers from the United States.

Then, of course, Section 4 has to do with impeachment.

The only thing that could possibly apply here is the item that I have indicated, which does not particularly apply in this instance, for the reason that I have given, and then the so-called "take care" clause which reads that:

" . . . he shall take care that the laws be faithfully executed, . . . "

Now, that means that, under the express powers of the President, there are only two that can be touched on, namely,

the matter of the "Commander in Chief" aspect, and the matter of "the take care clause".

The Government is not arguing the Commander in Chief clause. I am not sure whether they are arguing the take care clause either. I find them driven to argue that the President only has some kind of a presidential power, so what it is I don't know.

They try to argue the first section as a grant of power. I say that it is not a grant of power and it has never been held to be a grant of power. I say that none of the cases on which the Government relies supports that proposition.

As Mr. Tuttle said in connection with the Myers case, [fol. 1345] I dare say that the Department of Justice will rely principally on certain language of Chief Justice Taft in the Myers case to support their conclusion that there is basis for some kind of an argument to support their theory of inherent power.

In reaching the conclusion that the President has the power to remove Myers, the Postmaster, without the advice and consent of the Senate in a situation where he could only appoint him in the first instance with the advice and consent of the Senate, Chief Justice Taft—and they rely on the quotation the Government's brief themselves—relied on the "take care clause" and he spells out the theory that, if he is to execute the laws he must have agents to do so, reliable agents, and, consequently, he has a right to make a summary removal in that situation, as an implication from the duty to "take care that the laws shall be executed."

Chief Justice Taft did not rely on a residuum of power in the first section. He did not consider, in my judgment, as an ultimate conclusion that there was something in the first section which gave him some broad inherent rights.

I would wish to be frank with the Court and recognize that there are several phrases on the part of Chief Justice Taft in the Myers case which, picked out of text, by the [fol. 1346] Government, are relied upon to demonstrate the argument that in the delineation of special powers in the first section of Article II was not a consummation of all of the powers in Section 1.

It is true that in the course of reaching his decision Chief Justice Taft pointed out in the one hundred and some pages

that he wrote on the subject—and may I respectfully but quite frankly say unnecessarily wrote on the subject—what he said with respect to the general grant of power to the Executive in Article II is significant. The fact that he did state what I have referred to in his convincing opinion is significant, and I assume that some of the matter to which I have made reference, which was raised on the part of Chief Justice Taft will be the perch upon which the Government will rely here to bolster their contention for so-called inherent powers.

I say that what the Chief Justice said in that respect was unnecessary to the decision that Chief Justice Taft reached, because he came to the conclusion that the power to remove without the consent and advice of the Senate was implied from the “take care clause” of that article.

The Court: You seem to make a distinction between “inherent” and “implied” power.—

Mr. Wilson: I do. I do not want to quibble.

[fol. 1347] A King, your Honor, may by virtue of birth have some inherent powers—

The Court (interposing): I assume that your distinction is equivalent to what I have read from the brief.

Mr. Wilson: Of course, they can give lip service to this proposition that they mean these powers are in the four corners of the Constitution. They would not argue that the President has some power de hors of the Constitution, although today, in making their definition they are doing that. They would say that and give lip service to it, and say that this residuum of power is within the four corners of the Constitution. But, if they tell you that they use “inherent” as a synonym of “implied” they will tell your Honor that the first section which states that the power is vested in the President is a general grant of power, and they may draw their implications from that.

That is the way that they would have to get around my connotation of inherent.

The Court: That is why I asked this morning as to whether or not my recollection of the law was correct, that Congress had certain implicit powers and the Executive had certain implicit powers and that the Congressional implied powers were limited to those instances necessary to implement the express powers.

My question was if the same criteria was applicable to [fol. 1348] the President and Judge Bromley said that he would have someone look it up.

Mr. Wilson: It is the same.

The Court: Where is the case?

Mr. Wilson: I would say that the series of cases that I will discuss is to that effect.

The Court: Very well.

Mr. Wilson: I do not wish to be too technical in this response and with respect to this, but I doubt seriously if the Government's brief, in any of the sixty-nine pages it embraces uses the word "implied."

The Court: Then my question may be irrelevant.

Mr. Wilson: On more than one occasion they used "inherent" and I suspect strongly their use of "inherent" in opposition to the use of "implied."

The Court: Why not wait until we hear from them and reply to them on that?

Mr. Wilson: Would you think that the better course?

The Court: I think a good deal of the argument would be more helpful in that respect if it were reserved.

Mr. Wilson: If you would rather I talk afterwards—

The Court (interposing): No, no. I want to be informed as I go on.

Perhaps some of the matters you are discussing will not be material before the Court later.

[fol. 1349] Mr. Wilson: I think they will all be material. They cannot be missed, the way the Government's brief is fixed, and a great deal will be heard about the Myers case and the others that will be submitted.

I am wound up and all ready to go.

The Court: I think I will let you answer that argument when it is made. I do not want to cut you short, of course.

Mr. Wilson: I may be better prepared then than I am now.

The Court: All right.

Oral presentation on behalf of E. J. Lavino & Company.

By Randolph W. Childs, Esquire:

Mr. Childs: The Lavino Company, your Honor, is not a member of the steel industry. We have certain grounds in

common with the steel companies in this case, and some that are not.

It is thought, and it might be agreed, that the broader questions would be discussed first, rather than the other additional questions.

The Court: I would prefer that.

Is there anyone else who wishes to be heard for the steel companies?

(There was no response by counsel present.)

The Court: Then, we will take a brief recess.

(Thereupon at 3:08 o'clock p. m. recess was had until 3:12 o'clock p. m., when the following occurred:)

[fol. 1350] Oral Presentation on Behalf of the Defendant
by Holmes Baldrige, Esquire

Mr. Baldrige: May it please the Court: I should like to address myself preliminarily to two matters that arose during the presentation by the Plaintiffs:

First: The oral limitation made by counsel for the United States Steel Company of their written motion for a preliminary injunction against the seizure in its entirety; and

Second: The question raised by your Honor as to whether it would be necessary for you to balance the equity in the event that you decided the issue that there was no power in the present proceedings.

I assume, at least for the purpose of the oral limitation, that the United States Steel Company for the moment, at least, concedes the legality of the seizure for the purpose of the present hearing.

What the limitation amounts to is that this Court now enjoin any attempt on behalf of the Secretary of Commerce to change, in any way, the terms and conditions of employment, and that means:

First: That the United States Steel Company wants to be free from the effects of the strike;

Second: They want to be free from the possibility of any wage increase;

[fol. 1351] Third: They want protection in damages for any seizure; and

Fourth: Just compensation under the Fifth Amendment to the Constitution.

I suggest, your Honor, that the United States Steel Company cannot have its cake and eat it too. In fact, that is what the oral limitation of the written motion amounts to.

I may add that Labor has been damaged by this seizure. The only way in which Labor can make its position known and felt is through the power to strike, and that power to strike has been taken away by this seizure.

Obviously, the plants cannot be turned back to management unless and until the controversy which was immediately responsible for the seizure action of the President has been resolved.

If your Honor should enter a temporary injunction preventing any action by the Secretary of Commerce in changing the terms and conditions of employment, the whole situation would, in effect, remain on dead center.

Steel management has made it clear from the beginning of the controversy: "No wage increase; no price increase."

Under the instructions sent by the Secretary of Commerce to the Presidents of each of the steel mills those presidents were asked to assume the managership of their [fol. 1352] own plants under the general direction of the Secretary of Commerce.

There has been no interference of any kind with the ordinary general management as well as the day-to-day management of the steel companies' property.

As long as that condition obtains, the steel companies—the United States Steel Company here—are in the comfortable position, if your Honor grants the injunction they sought this morning, to sit tight and the seizure shall continue for an indefinite period.

The second, if your Honor should grant the injunction suit I do not see how you could possibly grant it without going into the merits of the existing wage dispute between the steel workers and management.

The Court: I do not get that—perhaps I misunderstood that.

When you said "the injunction suit" are you talking about the one sought by plaintiffs other than Steel?

Mr. Baldrige: No; the one sought by the United States Steel Company.

The Court: One defendant agreed with U. S. Steel.

Mr. Baldridge: I thought they did when you asked them to stand up and be counted.

The Court: Do I understand that none of the plaintiffs here agree with the United States Steel Company?

[fol. 1353] If that is not so, speak up.

(There was no response by counsel.)

The Court: All right.

Mr. Baldridge: As I was saying, your Honor, I do not think you can grant a motion like that without having a hearing on the merits with respect to the wage controversy.

Just to enter an injunction maintaining the status quo is what they seem to ask for and hence, if you do that, you would be keeping the whole controversy in dead center for a definite period without doing anything. To enter an order to enjoin the Secretary you must be satisfied that there would be no wage increase, that the status quo will be maintained, and there would have to be a hearing on the merits of that question.

The whole system as to wage controversies has been given over to specialized boards and to special agencies in this type of situation. I submit that it is not fair to ask this Court to decide the matter that is involved in the wage controversies.

Secondly, as indicated, other Governmental agencies have been set up to handle the wage situation.

As we have argued in our brief, as plaintiffs' counsel have indicated, we insist that they have an adequate remedy at law under the fifth Amendment. There is some question, as least in our minds, as to how serious the differences are [fol. 1354] between steel and the wage earnings.

I would like to read for a moment from the testimony yesterday of Mr. Stephens given before the Senate Labor Committee:

(The quotation from the testimony of Mr. Stephens, before the Senate Labor Committee on Wednesday, April 23, 1952, will be attached as "Appendix A" of this record, as the last page hereof; the text not being available for inclusion at the time of the preparation of this record.

The "Appendix A" is by this reference made a part hereof.)

Mr. Baldridge: Now, your Honor suggested that you would not need to go into the question of the balancing of equities if you decided at this time that there was no power in the President to seize.

It is our position that—

The Court (interposing): I think I said there was no power in Mr. Sawyer.

Mr. Baldridge: Well, Mr. Sawyer is the alter ego of the President.

The Court: Don't you think that cases abound in this jurisdiction, where executive officers have been enjoined from exercising powers beyond those conferred by law?

Mr. Baldridge: Yes; oh, that is right, under the Constitution or under statute.

[fol. 1355] This is not a situation where this occurred under any statute, but where it occurred under the Executive powers of the President.

The Court: Do you think that makes a stronger case?

Mr. Baldridge: Well, under the Land case and the Larson case—

The Court (interposing): But those cases related to powers granted by statute.

Mr. Baldridge: Correct.

The Court: Now, you contend that exercising powers where there is no statute makes a case stand on a different plane—a preferred plane?

Mr. Baldridge: Correct.

Our position is that there is no power in the Courts to restrain the President and, as I say, Secretary Sawyer is the alter ego of the President and not subject to injunctive order of the Court:

The Court: If the President directs Mr. Sawyer to take you into custody, right now, and have you executed in the morning you say there is no power by which the Court may intervene even by habeas corpus?

Mr. Baldridge: If there are statutes protecting me I would have a remedy.

The Court: What statute would protect you?

Mr. Baldridge: I do not recall any at the moment.

[fol. 1356] The Court: But on the question of the deprivation of your rights you have the Fifth Amendment; that is what protects you.

I would like an answer to that—what about that?

Mr. Baldridge: Well, as I was going to point out in a little while—

The Court (interposing): I will give you a chance to think about that overnight and you may answer me tomorrow.

Mr. Baldridge: Very well. I won't pursue this point at the moment.

If the Court disposes of this matter on the equities in the case then it won't be necessary for you to reach the Constitutional question at all. This is true even on the final hearing on the merits. If there is any other basis—which the Court could decide the case, without reaching the Constitutional issue, it has been held that that should follow. That is, if the case can be disposed of on the merits then, as I say, it is not necessary to go into the constitutional question at all.

I should like to refer to the case of Alma Motor Company vs. Timkin Company, 329 U.S. 129 at Pages 136 and 137, where the Court said:

“This Court has said repeatedly that it ought not pass on the constitutionality——”

The Court: What is the case? I know the principle, but [fol. 1357] what is the case?

Mr. Baldridge: The case is Alma Motor Company vs. Timkin Company, 329 U.S. 129. There the Court says:

“This Court has said repeatedly that it ought not pass on the constitutionality of an Act of Congress unless such adjudication is unavoidable. This is true even though the constitutional question is properly presented by the record. If two questions are raised, one of non-constitutional and the other of constitutional nature, and a decision of the non-constitutional question would make unnecessary a decision of the constitutional question, the former will be decided. The same rule should guide the lower court as well as this one.”

The Court: Is that exactly applicable?

Mr. Baldridge: It is. That involves statutory powers and this is a constitutional case.

The Court: I thought it grew out of this:

Someone brought suit alleging an Act of Congress was unconstitutional, but the Court found that there was sufficient legal substance to it to rest its decision on that, and the Court did not see why it should go out of its way to decide the unconstitutionality which had been alleged. The Court, as I understood it, decided it on the lack of legal [fol. 1358] merit in it.

Does not that case come close to that?

Here there is only one question raised. The plaintiffs claim that Mr. Sawyer has acted without the law, resulting in damage which is irreparable to them. That is their claim and it seems to me that the question that is here for me to decide is whether he has or has not. It seems to me that is what I have to decide.

Mr. Baldridge: I do not think, your Honor, that your position there is any different on a motion for a preliminary injunction than was the situation before Judge Holtzoff a couple of weeks ago when application was made for a temporary restraining order. That is quite apart from the legality or illegality of the defendant's action. Unless the plaintiff's prove irreparable injury then there is no reason why—

The Court (interposing): I would like cases on that from you where there is a showing of invalidity of power where the Court must find that the equities when weighed in the balance favor no granting of relief.

Mr. Baldridge: We will submit those.

The Court: I have asked the other side to do it. I have heard of cases on the law, learned argument with respect to them but no cases have been cited to me about it.

Mr. Baldridge: Their memorandum of law mostly were served last night or this morning and we would like to have [fol. 1359] a reasonable opportunity in which to make answer.

The Court: I do not know what a "reasonable opportunity" means.

Mr. Baldridge: Well, we would like a week if possible.

The Court: These cases involving applications for temporary injunction require speedy action, almost immediate action by the Court.

Now, unless there is an agreement to maintain the status quo I think the parties are entitled to a very prompt decision, and such a decision will be made by me for I will consider this case to the exclusion of everything else working day and night and I will decide it, and that is not consistent with your request for a week's time—

Mr. Baldridge (interposing): Whatever time.

The Court: I am not fixing the time, but when I take this case and consider it I shall act on it as expeditiously as I can and I shall not wait for briefs to be filed in reply to any argument or other briefs. If you have any idea to the contrary or if you had any such idea as that you should have said something about it before this argument started—that is, unless you are willing to keep the status quo and are willing to make that agreement.

Mr. Baldridge: I cannot make that agreement or promise to maintain the status quo, your Honor.

The Court: Then I cannot give you the time you ask for. [fol. 1360] It would not be fair to the other side.

These motions take precedence over all other motions.

Mr. Baldridge: I can understand the necessity for speedy action on a motion for a temporary restraining order, but that stage has passed in this case.

The Court: I cannot go along with you on that. A temporary restraining order is one that is issued without notice to the other side, as a rule.

Mr. Baldridge: Correct.

The Court: While a temporary injunction is one that is issued, in the course of things, within a week. We make it ten days because of our requirement for five days notice and five days in which to file the opposing brief. It is the method provided to cope with situations that, because of delay, would result in damage if, for instance, we had to wait for an answer.

Mr. Baldridge: My only answer to that is that I do not think that the situation is any different than when a man comes in for a restraining order, insofar as irreparable damage—but we will get you cases on that.

The Court: When I take this case under advisement I will work on it to the exclusion of everything else and when I reach a decision I will file it forthwith unless you agree to maintain the status quo in the meantime.

Mr. Baldrige: I cannot make that commitment, your [fol. 1361] Honor. I am not in a position to.

The Court: All right. That is the usual commitment people make when they want time in which to file briefs.

Mr. Baldrige: I find, of course, that I am acting for the Chief Executive with Mr. Sawyer as his representative.

The Court: You are appearing in this Court as Attorney for Charles Sawyer on the record.

Mr. Baldrige: I would like to pass now, your Honor, to the so-called balancing of equities.

Mr. Bromley admitted in his argument that the defendant might have power to act in some circumstances but that these are not those circumstances.

Now, what are the circumstances which resulted in the President's action?

First, we start with the Executive Order itself in which the President set out the essential nature of the manufacture of steel and of weapons used by the Armed Forces; that steel was indispensable in carrying out the atom energy program; that a continuous supply of steel was necessary for civilian economy on which the military success depends; that a work stoppage in the steel industry would immediately jeopardize and imperil the national defense and the defense of those joined with us in resisting aggression in parts of the world outside the continental [fol. 1362] United States; and, among other things, the stoppage would add danger to our combat troops.

Such findings, your Honor, I submit are adequately supported by the affidavits on file in this case:

I will refer to two or three of the more important affidavits on file in this case, and I refer first to the affidavit of the Secretary of Defense, the Honorable Robert A. Lovett:

Secretary Lovett says that he is the Secretary of Defense of the United States and that he is the principal assistant to the President in all matters relating to the Department of the Defense, and, under the direction of the President, he has direction, authority and control over

the Department of Defense, including the departments of the Army, Navy, and Air Force, and the munitions board.

Secretary Lovett says that pursuant to these statutory duties and in the exercise thereof, he has information relating to the problems of procurement, production, distribution, research and development concerning the logistics requirements of the Armed Forces of the United States in weapons, arms, munitions, equipment, materials and all other necessary supplies for the Armed Forces of the United States.

Secretary Lovett says that there exists a state of national emergency declared by the President on December [fol. 1363] 16, 1950; that communist aggression is forcing the free world to fight a limited war on the battlefield and an unlimited war of preparation and production.

The Secretary of Defense says that United Nations Armed Forces, largely American, are today fighting a war with Communist armies and Air forces in Korea. The French are fighting Communist forces, he says, in Indo China. That there is a constant threat of further Communist military aggression in other areas and that the men actually fighting Communist forces have been armed for the most part by American industry, and they are relying on American industry to supply the weapons and munitions they need in daily combat.

That to meet this threat of further aggression, we have deployed military forces in Europe and elsewhere and friendly nations have joined us and have assigned their own military units to hold the line along with our forces. These men on the line which may become the firing line at any time, have been armed by western industry, largely American, and they rely on our industry to supply an essential part of the weapons and munitions they must have to defend themselves and all of us.

The Secretary of Defense says that we and other nations are training large numbers of men to increase the forces already combat worthy and to replace those who have [fol. 1364] served their turn and done their duty.

In our case this involves building the core of our nation's defense—a well trained home force fully equipped with modern weapons and equipment. The weapons and equip-

ment for this great training effort have come and must come largely from American industry.

The Secretary says that the steel industry of the United States provides the basic commodity required in the manufacture of substantially all weapons, arms, munitions and equipment produced in the United States. An adequate and continuing supply of steel is essential to every phase of our defense effort.

The Secretary of Defense says in his affidavit that the cessation of production of steel for any prolonged period of time would be catastrophic.

He says that it would add to the hazards of our own soldiers, sailors and airmen and of other fighting men in combat with the enemy. He says it could result in tragedy and disaster.

It is stated also by the Secretary of Defense that it would prevent us from adequately arming the military forces now facing the enemy on uneasy fronts.

It would seriously delay us in adequately training and arming their replacements and reinforcements, and in building the core of our nation's defense, our home force. [fol. 1365] Secretary Lovett says that for economic and financial reasons our armament program has been "stretched out" approximately a year longer than our military men desired from a purely military point of view and that a cessation of steel production at this time would add materially to the risk the stretch-out already entails, thereby increasing the calculated risk we are taking to an unjustifiable point so that to complete the program will take us until 1955 rather than to the date fixed in the original plan, 1954.

Secretary Lovett has made also this very significant statement: That due to newly developed weapons they require more steel, and I quote the Secretary of Defense where he says:

"We are holding the line with ammunition and not with the lives of our troops",

after, in his affidavit, he had pointed out the situation with respect to arms and the fact that the techniques and

objectives now employed require a greatly increased use of steel.

He has pointed out in his affidavit that a sudden and large-scale resumption of combat in Korea may occur at any time and, in such case, the demands for ammunition as well as many other types of munitions would vastly increase.

Secretary Lovett points out that:

[fol. 1366] "Another specific example of a critical shortage is in stainless steel. Fifteen per cent of all stainless steel produced in the United States is used in the manufacture of airplane engines, including jets. No jet engine can be manufactured without substantial quantities of high alloy steels."

Secretary Lovett concludes, therefore, that any curtailment in the production of steel, even for a short period of time, will have serious effects on the programs of the Department of Defense which are essential, and would be disastrous.

In support, also, of defendant's opposition to plaintiffs' motion for a preliminary injunction is the affidavit of Gordon Dean, Chairman of the United States Atomic Energy Commission.

The affidavit of Gordon Dean states the need for the production of fissionable and other materials for atomic weapons authorized by the President and the Congress, and the expansion program which includes the construction of major facilities at Savannah River, South Carolina, Paducah, Kentucky, Fernald, Ohio, and other places.

Gordon Dean has stated in his affidavit that dates for the completion of the construction program established by the President to fulfil the requirements of the Armed [fol. 1367] Forces in the interest of the National security are integral parts of the program and that national security is dependent on the production and on delivery of materials required in this program.

Attention is called by Gordon Dean to the time already lost through schedule slippages attributable to delivery delays which must be recovered and that these recoveries

cannot be had nor can the program be met in the event of a nationwide stoppage of production of steel.

[fol. 1368] There are further affidavits from Mr. Henry H. Fowler, Administrator of the National Production Authority, and the Secretary of Commerce, from the Secretary of the Interior, stating the crippling effect that even a short stoppage of production in steel would have on the petroleum, gas and electric power fields, products of which are of course essentially necessary in the expansion not only for domestic production but for military use as well.

Now, what are the plaintiffs' interests here as contrasted to those of the defendant?

They have alleged that seizure interferes with customer relations and destroys the good will of the companies, destroys their trade secrets, harms the plants, by virtue of having them operated by inexperienced managers, and they invade the stockholders rights to select managers, and also that it would interfere with their labor relations, to-wit, their ability to bargain collectively with their employees.

The Executive Order as well as Order No. 1 of the Secretary of Commerce provides that there will be no interference by the Secretary of Commerce unless, of course, directed by the Secretary, and that the Secretary's order appoints the President of each steel company as the manager of that company; that the operations are to be conducted by him in the same day to day fashion as they would be conducted had the Government actually placed strangers [fol. 1369] in as managers, and the same applies to the accumulation of profits and relations between the steel companies and their stockholders.

Now, as to their charge that it interferes with their labor relations.

The Executive Order as well as the Secretary of Commerce's Order No. 1 permitted the Secretary to change terms and conditions of employment but it also was designed, and the words so state, to encourage the continuation of collective bargaining as between management and the Union. Since the seizure occurred on April 8th there have been several conferences between management and labor in connection with attempts to arrive at some agreed settlement of the wage controversy.

The Court: Now, Mr. Attorney General, it is getting near the time when we shall have to stop. I wonder if you would give me such assistance as you can before we stop so that I can think about your viewpoint overnight, as to your power, or as to your client's power.

As I understand it, you do not assert any statutory power.

Mr. Baldridge: That is correct.

The Court: And you do not assert any express constitutional power.

Mr. Baldridge: Well, your Honor, we base the President's power on Sections 1, 2 and 3 of Article II of the [fol. 1370] Constitution, and whatever inherent, implied or residual powers may flow therefrom.

We do not propose to get into a discussion of semantics with counsel for plaintiffs. We say that when an emergency situation in this country arises that is of such importance to the entire welfare of the country that something has to be done about it and has to be done now, and there is no statutory provision for handling the matter, that it is the duty of the Executive to step in and protect the national security and the national interests. We say that Article II of the Constitution, which provides that the Executive power of the Government shall reside in the President, that he shall faithfully execute the laws of the office and he shall be Commander-in-Chief of the Army and of the Navy and that he shall take care that the laws be faithfully executed, are sufficient to permit him to meet any national emergency that might arise, be it peace time, technical war time, or actual war time.

The Court: So you contend the Executive has unlimited power in time of an emergency?

Mr. Baldridge: He has the power to take such action as is necessary to meet the emergency.

The Court: If the emergency is great, it is unlimited, is it?

Mr. Baldridge: I suppose if you carry it to its logical [fol. 1371] conclusion, that is true. But I do want to point out that there are two limitations on the Executive power. One is the ballot box and the other is impeachment.

The Court: Then, as I understand it, you claim that in time of emergency the Executive has this great power.

Mr. Baldrige: That is correct.

The Court: And that the Executive determines the emergencies and the Courts cannot even review whether it is an emergency.

Mr. Baldrige: That is correct.

The Court: Do you have any case that sustains such a proposition as that?

Mr. Baldrige: Yes, indeed, your Honor.

The only case in which an attempt was made by the Courts to interfere with the exercise of inherent executive power is the case of *Mississippi vs. Johnson*, reported in 4 Wall 475. I think your Honor may be familiar with the facts of that case.

The Court: Yes.

Mr. Baldrige: There the Court held—

The Court: There is no seizure in that.

Mr. Baldrige: Well, there was an attempt to stay executive power, and the Court decided they did not have that power.

The Court: There is no attempt to stay executive power [fol. 1372] here. It is to stay Mr. Sawyer's act. That is what they claim.

Mr. Baldrige: Well, Mr. Sawyer in this case is the alter ego of the President.

Suppose your Honor could enjoin Mr. Sawyer. The President could immediately appoint somebody else to operate the steel mills, or he could undertake that himself.

The Court: That bridge would be crossed when it is reached. The only case you have, then, is the *Mississippi vs. Johnson* case?

Mr. Baldrige: The only case in which there has been an attempt—

The Court: Do you have any case of a seizure except a seizure authorized by statute during wartime, which made the statute constitutional?

Mr. Baldrige: Well, we have set out in our brief a number of instances, your Honor, in which seizure occurred in the absence of statutory authorization.

The Court: I mean where the Courts approved it.

Mr. Baldrige: I do not know of any—

The Court: I do not think a seizure without judicial interference is relevant. The fact that a man reaches in

your pocket and steals your wallet is not a precedent for making that a valid act.

Mr. Baldridge: I might call your Honor's attention to [fol.1373] the Pewee Coal case, reported in 341. That case went like most of the others. The Court has always avoided decision on the question as to whether the Executive had the power.

The Court: That was a Court of Claims case, was it not?

Mr. Baldridge: That is right. But that involved a suit for just compensation by a coal company which had been seized by the President under Executive Order in 1943 without statutory authority.

The Court: And it elected to sue for damages.

Mr. Baldridge: That is right.

The Court: How does that support you?

Mr. Baldridge: As I say, your Honor, the Courts have—at least the Supreme Courts, some of the lower courts, have passed on the power and held that they have it.

The Court: That you have the power?

Mr. Baldridge: That is right.

The Court: Cite one to me.

Mr. Baldridge: I am sorry, your Honor, for the delay.

The Court: That is all right. Take your time.

Mr. Baldridge: Page 26 of my memorandum.

The Court: What is the case?

Mr. Baldridge: The case is Employers Group of Motor Freight Carriers, Inc., et al. vs. National War Labor Board, et al., 143 Fed. 2nd 145, 151.

The Court: Was that not under a statute? It is my [fol.1374] recollection of it. I think the statute was so broad that it forbade judicial review. Nevertheless the Court of Appeals upheld it because Congress said so. That is my recollection of it.

Mr. Baldridge: Well, your Honor, the broad constitutional power of the President does not depend on any action taken by the War Labor Board.

The Court: If I am wrong about my recollection of that case, I want to be corrected.

It is five minutes of four. You see the points on which I want assistance, Mr. Attorney General, and you can be

going over those points this evening and be prepared in the morning.

Mr. Baldrige: I will.

The Court: We will adjourn now until tomorrow morning.

(Thereupon at 3:55 o'clock p.m. an adjournment was taken until 10 o'clock a.m., Friday, April 25, 1952.)

[fol. 1375]

Washington, D. C.,
Friday, April 25, 1952.

Pursuant to recess heretofore on Thursday, April 24, 1952, taken, the above-entitled causes of action at 10 o'clock in the forenoon on Friday, April 25, 1952, came on for further hearing

[fol. 1376]

Proceedings

The Court: You may proceed, Mr. Baldrige.

Mr. Baldrige: May it please the Court, I should like to hand to Your Honor a brief two and a half page supplemental memorandum on the question you inquired on yesterday as to whether you must reach the Constitution before balancing the equities. Copies have been furnished counsel.

When I closed the argument yesterday Your Honor put several questions to me which I should like first to address myself to:

One was the question in connection with Presidential powers; You asked whether if the President empowered the Secretary of Commerce to take me into custody and execute me, would I have no recourse to the courts and would you have no power to enjoin the President.

The case I think nearest on the facts to that situation is the case of *Ex Parte Merryman*, cited in the footnote on page 21 of our brief. The facts in that case were briefly as follows:

The case involved an application by the petitioner to Chief Justice Taney who was sitting on circuit, for a writ of habeas corpus.

The petitioner, a resident of Baltimore County, Maryland, was taken into custody by the Armed Forces. They [fol. 1377] compelled him to leave his house and to accompany them to Fort McHenry.

In the application for a writ of habeas corpus, the Judge concluded that the petitioner appeared to have been arrested upon general charges of treason and rebellion without proof and without giving the names of witnesses or specifying the acts which in the judgment of the military officers, constituted the crime.

In his opinion, Chief Justice Taney held that the suspension of the writ of habeas corpus by President Lincoln was invalid, the writ of habeas corpus having been at that time suspended.

But Chief Justice Taney stated that unless the President chose voluntarily to follow the decision of the court, the court was powerless to make its order effective. Hence he issued no injunction, but merely filed his opinion and the records in the case in the Clerk's office, and sent a copy of the papers to President Lincoln.

In the opinion of Chief Justice Taney he said—and I quote:

"I shall therefore order all the proceedings in this case with my opinion to be filed and recorded in the Circuit Court of the United States for the District of Maryland and direct the Clerk to transmit a copy under seal, to the President of the United States.

[fol. 1378] "It will then remain for that high officer in fulfillment of his constitutional obligations to take care that the laws be faithfully executed to determine what measures he will take to cause the civil process of the United States to be respected and enforced."

The Court: Did not Chief Justice Taney also say that he did not have the superior physical power necessary to carry out his decision?

Mr. Baldridge: There was some discussion of that, Your Honor, but he based his decision—

The Court (interposing): On the premise, as he stated, that the Court did not have at its disposal means to overcome the military force that was holding the petitioner in Maryland.

Was there not something of that kind in that case?

Mr. Baldridge: There was some discussion of that, Your Honor, along those lines, but as I read the case the dis-

cussion was based upon the Court's belief that, as a court, Chief Justice Taney had no power to enjoin the Chief Executive.

The Court: I have not read that case in recent years, but I have read it in years gone by. My recollection is Chief Justice Taney said that he did not have the physical [fol. 1379] force with which to combat the Army of the United States and that he therefore bowed to superior physical power. But, he did not deny the existence of power in the court.

But, is that applicable to the case I posed to you?

Mr. Baldridge: Your illustration seemed to me to involve the ultimate extension of the absence of the power of the court, if there be such an absence.

The Court: That may have been a hard case that I used as an example.

Let me put a case to you that is not quite so difficult:

Supposing the President should declare that the public interest required the seizure of your home and directed an agent to seize it and to dispossess you: Do you think or do you contend that the court could not restrain that act because the President had declared an emergency and because he had directed an agent to carry out his will?

Mr. Baldridge: I would rather, Your Honor, not answer a case in that extremity. We are dealing here with a situation involving a grave national emergency.

I think that in determining the question whether the courts can enjoin executive power, it is essential that you look at the circumstances which give rise to the exercise of that power.

I think that here, particularly in view of the affidavits [fol. 1380] that have been filed in support of the position—that certainly there has been no attempt made to deny that there was and that there is a grave national emergency that requires the exercise of rather unusual powers in these particular circumstances.

I do not believe any President would exercise such unusual power unless, in his opinion, there was a grave and an extreme national emergency existing.

The Court: Is that your conception of our Government?

Mr. Baldridge: Our conception of the powers of the Executive, Your Honor, is that under the doctrine of separa-

tion of powers—which I shall discuss a little more at length after a while—that, except for an occasional overlapping, there have not been and are not any instances of importance where one branch of the Government attempts to encroach upon the power and authority of the other.

The Court: Well, is it not your conception of our Government that it is a Government whose powers are derived solely from the Constitution of the United States?

Mr. Baldrige: That is correct.

The Court: And is it not also your view that the powers of the Government are limited by and enumerated in the Constitution of the United States?

Mr. Baldrige: That is true, Your Honor, with respect [fol. 1381] to legislative powers.

The Court: But it is not true, you say, as to the Executive?

Mr. Baldrige: No. Section 1, of Article II of the Constitution—

The Court (interposing): Have you read the case of *McCullough v. Maryland* lately?

Mr. Baldrige: I have, Your Honor.

Section 1, Article II, of the Constitution reposes all of the executive power in the Chief Executive.

I think that the distinction that the Constitution itself makes between the powers of the Executive and the powers of the legislative branch of the Government are significant and important.

In so far as the Executive is concerned, all executive power is vested in the President.

In so far as legislative powers are concerned, the Congress has only those powers that are specifically delegated to it, plus the implied power to carry out the powers specifically enumerated.

The Court: So, when the sovereign people adopted the Constitution, it enumerated the powers set up in the Constitution but limited the powers of the Congress and limited the powers of the judiciary, but it did not limit the powers of the Executive.

[fol. 1382] Is that what you say?

Mr. Baldrige: That is the way we read Article II of the Constitution.

The Court: I see.

I have never heard that view expressed in any authoritative opinion of any court. If you have any cases expressing that view, I would certainly like to hear them.

Mr. Baldridge: Well, in a moment I was going to get to the attempts that have been made on the part of the courts to enjoin the Executive.

The Court: Very well.

Mr. Baldridge: Another question that was raised by Your Honor yesterday was this:

Why may a court enjoin an executive officer from acting under an unconstitutional statute but may not enjoin him on acts taken without statutory authority?

Now I want to say preliminarily that our petition on the pending motion for a temporary injunction does not rest primarily upon the question of the immunity of the President from suit.

Our main argument—and that is advanced also in our memorandum—is that if the conventional test of the balancing of the equities is applied, then the plaintiffs' motions here should be denied.

We also raise the question of the immunity of the President [fol. 1383] ident to suit, but only as an additional reason why this Court should deny the injunction prayed for.

Now, as to the line of cases cited yesterday by counsel for the plaintiffs involving suits against the United States, such as the Dollar case and the Lee case: We say they are irrelevant in this proceeding because the issue raised here is one of "indispensable party" rather than one of an "unconsented suit against the United States."

While it is true that the United States cannot be sued without its consent, nevertheless, in order that there may be judicial review of executive acts, the Courts have developed the fiction that an officer who acts in excess of statutory authority or who acts under an unconstitutional statute is not acting as an officer, but is acting in his individual capacity. Hence, as an individual, he may be reached by judicial process.

Assuming under such a fiction a suit to test the validity of executive action would lie. The question may arise as to whether the Executive Officer is before the Court. If he has not been made a party defendant, then the action may fail because of the plaintiff's inability to join this party

as a defendant, even though the suit is not an unconsented suit against the United States.

I mean this: We do not say that it is an unconsented [fol. 1384] suit against the United States, but we do say that the President is an indispensable party and, because the President cannot be enjoined as a defendant, he is immune from judicial process.

The question here is not whether this is a suit against the United States. The question is whether the President is, in fact, an indispensable party.

Based on the discussion made here yesterday I submit that the President is an indispensable party because clearly in the Executive Order it was the President that seized this property. True, the mechanical details of carrying out the seizure were delegated to his alter ego, the Secretary of Commerce, but we cannot lose sight of the fact that the act of seizure was the act of the President and was not the act of any other officer of the Federal Government.

Now, the next question that the Court posed was a request for cases holding that the Court cannot enjoin the President:

I think I indicated yesterday that the case of *Mississippi v. Johnson* reported in 4 Wallace is the only case reporting an instance in which an attempt was made to invoke the power of the Court directly against the Executive.

If Your Honor will recall, in that case the State of Mississippi [fol. 1385] sought to restrain the President and General Orr from carrying into effect the Post War Reconstruction Act on the ground that they were illegally attempting to impose unconstitutional legislation on the people of the State of Mississippi. The Supreme Court refused to enjoin either the President or his military commander, General Orr, and based that refusal on the ground that the Commander-in-Chief, the President, was performing purely executive or military duties in enforcing the law, whether constitutionally valid or not.

In that connection the Court said—and I quote:

“The Congress is the legislative department of the Government. The President is the executive department. Neither can be restrained in its action by the

judicial department though the acts of both when performed are, in proper cases, subject to its cognizance."

I submit that there again is a restatement of the separation of powers doctrine, which is a part of our constitutional system; that one branch of the Government will not encroach, except in an incidental overlapping, on the powers and duties of any one of the other two co-equal branches.

It is our position that the President is accountable only to the country, and that the decisions of the President are [fol. 1386] conclusive.

Also, we say that where an executive officer acts at the direction of the President, in the sense that Mr. Sawyer here is the alter ego of the President, the courts will not interfere.

We say here for the courts to encroach upon the executive authority is prohibited in a situation such as we have here, where the plaintiffs have an available remedy but have refused to pursue it. They have an adequate remedy at law in a suit for just compensation under the Fifth Amendment.

The Court: Does not that presuppose the legality of the taking?

Mr. Baldrige: That is correct, Your Honor.

The Court: How would there be a remedy if the taking was illegal?

Mr. Baldrige: We suggested in the hearings before Judge Holtzoff that a tortious taking would be remedied by an action for damages under the Federal Tort Claims Act.

The Court: How do you answer the argument made by your opponents to the contrary in citation of cases on that point?

Mr. Baldrige: Your Honor, that is the reason I asked yesterday for a week—not to postpone the hearing—in which to answer the briefs that were served on us just [fol. 1387] about ten minutes before court convened yesterday.

I have not read the memoranda nor have I had an opportunity to.

The Court: Well, as I indicated yesterday, if objection was to be made to the filing of the briefs, you should have

made the objection known at the time when the attempt was made to file the brief.

Mr. Baldridge: Well, I think Your Honor is entitled to all the help in this important situation that counsel on either side can give you. It is not only an important problem, it is an exceedingly difficult one.

The Court: I agree with you.

Mr. Baldridge: There are no clear-cut lines of authority either way.

We have presented in our memorandum, and we have covered it somewhat at least in our oral argument thus far, by citing cases that we think are applicable, and we have reviewed the executive and legislative history which plaintiffs cavalierly tossed off as being meaningless.

We think, with respect to the matter of constitutional interpretation that custom and usage are important elements in determining what the law is.

The Court: But you said yesterday that you were unable to or unwilling to or that you were not authorized to maintain the status quo for that length of time—that is, while [fol. 1388] the case was being heard.

Mr. Baldridge: I said I was not able to make a commitment on the status quo in so far as the situation with respect to terms and conditions of employment is concerned. I want to advert to that later. This proposed change in terms and conditions of employment by the Secretary of Commerce, with the approval of the President, is not a "one-way street." It is contemplated that when a change in terms and conditions of employment is made that an adjustment in the way of the Capehart benefit will be made in the way of a price increase for steel, or at approximately the same time that a wage increase may be put into effect.

As to when a wage increase and a Capehart increase would be put into effect, if it is put into effect, I do not know. This situation is one that fluctuates from day to day. There are a tremendous number of people and a tremendous number of agencies that are interested in it, that are working on it, that are attempting to solve a most difficult situation; and a situation that exists today may in some feature or another be changed tomorrow.

I just cannot give, as I suggested yesterday, any assurance to the Court that the status quo will be maintained.

until such time as this Court has had an opportunity to act on the pending motions—I am sorry I cannot.

The Court: Well, I shall then have to act on the motions [fol. 1389] as expeditiously as possible, consistent with a complete, calm, and deliberate understanding of the case, and make my decision on the case. But I cannot assure you that that will be within a week. My impression is that it will be in much less time than a week, because I think the exigencies of the case require—that indeed justice requires—prompt action.

[fol. 1390] Mr. Baldridge: We agree with Your Honor, although I do want to restate one thing I said yesterday.

The plaintiffs argued here that the damage as a result of the seizure has been incalculable. We want to reiterate that the seizure has also taken away from the unions the only weapon they have to enforce what they think are their rights, namely, the right to strike. They are now Government employees, and as such, cannot strike. Again, this seizure is not a one-way street. I want to give some figures a little later on to show that the condition is not as serious as all statements of counsel for plaintiffs might indicate. Even though it isn't a matter that is really before this Court directly, I think that it is necessary and essential background to an understanding of the issues here.

Now, yesterday I reviewed briefly the executive powers conferred on the President by Article II of the Constitution, particularly Section 1, which provides that: "The executive power shall be vested in the President of the United States of America."

And in Section 2 of Article II, the President is made the Commander-in-Chief of the Army and the Navy of the United States.

And in Section 3 of Article II it provides that the President shall take care that the laws be faithfully executed. [fol. 1391]

Now I should like to compare, as I have briefly a moment ago, the grant of the power to the Chief Executive in Article II as compared to the legislative grant in Article I.

Article I, Section 1, reads, and I quote: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Now, contrast that with Section 1, Article II, which reads: "The executive power shall be vested in a President of the United States."

It is obvious that the legislative powers are limited to those specifically enumerated, whereas all executive power, whether or not enumerated, is vested in the Chief Executive. Hence, the executive power is broader. One might say it is similar to the legal principle of self-defense, that having a broad grant of power the executive, particularly in times of national emergency, can meet whatever situation endangers the national safety of the country.

We submit, if Your Honor please, that the burden of proof here lies with the plaintiffs to show that there is no power in the Executive to seize. Yesterday the Government was placed on the defensive, and asked to show wherein [fol. 1392] lies power to seize. We are not the moving parties here. The plaintiffs, the steel companies, have asked Your Honor to enjoin this seizure. It is their duty to make a showing, if they can, that no such power resides. And all they have shown so far is to make oral assertions that no such power exists.

In the Government's memorandum we have analyzed the applicable provisions of the Constitution. We have dealt with customs and usage in so far as the executive and legislative branches of the Government are concerned. And we have given Your Honor the benefit of what case law is available.

I want to point out that whether that be too convincing or not, there is not one single instance in which the courts have enjoined executive power where it was based upon the Constitution and not upon statute.

Now, if the plaintiffs here have such cases, we say let them come up with them. We have not seen them. We have been unable to discover any.

Now, I should like to advert briefly to an interpretation of the powers of the Executive as set out in Article II of the Constitution. The plaintiffs yesterday relied upon the treatise written by ex-President Taft in 1916 in which he says that there is no residuum of power that the President can exercise merely because he thinks it is in the public [fol. 1393] interest. We contrast that with the attitude of other Chief Executives as to their idea of what constitutes executive power.

Theodore Roosevelt believed in the stewardship theory of the Presidency. He believed that the President can do what is imperatively necessary for the good of the nation without specific authorization. He believed that it is the duty of the President to do what the needs of the nation demand unless forbidden by the Constitution and laws.

Of course, as a result of that view, there was a greatly expanded view of the executive power.

As far back as the days of Alexander Hamilton, a broad construction of executive powers have been strongly advocated. Hamilton said that the specific enumeration of powers merely specifies the principal powers implied in the Chief Executive, that the remainder flows from the general grant.

Even Chief Justice Taft ten years later after his statement in the treatise that there were no remedial powers in the President, when faced with a specific case, the Myers case, averted to yesterday by plaintiffs, held expressly that Section 1, Article II, constitutes a general grant of the executive powers of the President.

We submit further, Your Honor, that Section 3 of Article II requiring that the President shall take care that the [fol. 1394] laws be faithfully executed is also important. The scope of this section is explained and elucidated in the Neagle case, reported at 135 U. S., which involved a habeas corpus proceeding brought by the United States Marshal against Neagle who had killed one Terry in the defense of Judge Field.

In that case the Court held that the executive power conferred by Section 3 is not limited to the enforcement of the laws of the United States, but includes, and I quote:

"The rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution."

In this case a strike would prevent this Government from keeping its treaty obligations with other Governments because this country has become the arsenal for arms and weapons. We have treaties, particularly with the NATO countries, that this country will supply certain arms, a

larger part, as a matter of fact, of the arms necessary for defense of Western Europe against the constant threat of Soviet aggression. Those are solemn treaty obligations. Those commitments cannot be fulfilled unless there is an adequate and continuous supply of steel for the manufacture of arms.

We submit, further, Your Honor, that the scope of executive power is demonstrated further by the so-called Prize cases. In these cases the validity of President Lincoln's blockade of the Southern ports was upheld even though the Congress had not at that time declared war.

In connection with the holding, the Court said, and I quote: "The Constitution confers on the President the whole security power."

Again in the Debs case which involved the labor dispute between the American Railway Union and the Pullman Company, and involved violence in such degree as to obstruct the mails, an injunction restraining the strike was issued. Over the objection of the Governor of Illinois President Cleveland sent troops in to "enforce the faithful execution of laws, and to protect and remove obstruction of the mails."

With respect to the use of Federal troops, the Court said that the executive would take whatever steps were necessary to meet the situation.

I submit, Your Honor, that the national interest involved in that strike was far less than the situation today, and yet the courts held that executive power was sufficient in reach to meet that particular emergency.

Now I should like to pass briefly to the construction given Article II by both the executive and legislative branches of the Government.

[fol. 1396] This is the so-called custom and usage approach which we think are important in determining what constitutional powers are.

Apparently the extent of the exercise of executive power depends upon the views held by the particular president with respect to the magnitude of the problem. It might even be said that what the Presidency is depends, in important measure, on who is President.

In Lincoln's day the Secretary of War, at the President's direction, seized the railroads and telegraph lines between Annapolis and Washington. This was without specific legislative or statutory authority.

Again, confronted with secession, he issued the famous Emancipation Proclamation which he rested exclusively on his powers as Commander in Chief, without specific legislative or statutory authority.

He also increased the Army and the Navy and suspended the writ of habeas corpus.

He proclaimed the blocking of the southern ports, also without legislative or statutory authority.

In Wilson's time he exercised inherent power, not authorized by any statute, and seized the arms plant of the Smith and Wesson Company which had refused to accept the mediation decisions of the National War Labor Board, and the President seized the company under inherent powers [fol. 1397] in order to secure continuity of production.

Wilson, like Theodore Roosevelt, held the "stewardship" view of the Presidency, also in the absence of legislative authority, and created the War Industry Board, the War Labor Board, and the Committee on Public Information.

Also in the absence of statute he ordered the telephone and telegraph lines to be operated under the regulations of the War Department and the Navy Department.

President Franklin D. Roosevelt made extensive use of the inherent powers in the Presidency on at least twelve occasions prior to the passage of the War Labor Disputes Act in 1943 and, in 1943, issued executive orders taking possession of plants when it appeared that work stoppage would impair the war efforts, and the first seizure was six months before Pearl Harbor—the seizure of the North American Aviation plant.

President Franklin D. Roosevelt did not hesitate to use the inherent powers reposed in the Executive, even in peace time, if the national emergency was sufficiently grave—to illustrate I need only refer to his declaration of the National Bank Holiday.

Now, what has the Congress said about the use, the meaning and scope of executive power and the power of the executive to act?

In two instances in the memorandum, the one dealing [fol. 1398] with the Lincoln seizure of the railroads and telegraph lines, and the other with the hearings in connection with the passage of the War Labor Disputes Act in Franklin D. Roosevelt's Administration, the Congress was considering whether it should pass laws which would give statutory authority to the acts that the President had taken under his inherent power. Almost without exception, Congressional debates will indicate that the members of the legislative branch of the Government thought that the President had the powers that he exercised. It is interesting to note that most of those who voted "no" did so on the specifically stated reason that it might be construed as a limitation on the powers that they admitted the Executive already had.

Now, a word as to how the Courts considered the matter: They have held that the Executive, in appropriate circumstances, has inherent power in the nature of eminent domain and police power to seize, without statutory authority, and the Courts have been concerned not so much with whether the power existed but whether just compensation is required in view of the circumstances, and, as to that, they have held if the taking was under the power of eminent domain just compensation was required, and, if the taking was under the police power, no compensation was required.

As I indicated a while ago the Congress has assumed the existence of this inherent executive power without deciding [fol. 1399] it, and it is significant that they have never struck it down.

The Court: Where have the Courts assumed the power existed?

Mr. Baldrige: I beg your pardon?

The Court: I say: Where have the Courts assumed the inherent power existed?

Mr. Baldrige: The Pewee Coal is an apt illustration. The President, without statutory authority, seized the coal mines of the country to avert the paralyzing effect of the strike, and he did so under executive order, and, after the seizure, Pewee sued the Government for just compensation under the Fifth Amendment. Without deciding specifically whether the Executive had the power to seize without statutory authorization, the Court held that the seizure

was lawful and, being lawful, the company was entitled to just compensation under the Fifth Amendment for the property taken.

The Court: Are you sure?

Mr. Baldridge: Yes, indeed.

The Court: My recollection is that the ground of the seizure, so far as its constitutional authorization was concerned, was never raised.

Mr. Baldridge: The Court did not pass on the question whether the President had the power to seize in the absence [fol. 1400] of a statute, but it held that the seizure was valid.

The Court: The Court viewed it as a fait accompli and recompensed for the damage suffered, and never considered the other view of it.

That is my impression of that case.

If I am wrong about it, I wish to be corrected.

Mr. Baldridge: I had a different view of it, your Honor, but, whether your view is correct or mine is, the case stands for the proposition that the Court did grant just compensation over the vigorous objection of the Government, and, after all, it was a small, a token, seizure but it did require the payment of just compensation.

The Court: But you did not raise the question in that case that the seizure was illegal, which would have been a complete defense.

Mr. Baldridge: No, apparently not; I do not believe it was raised by either side.

Mr. Kiendl: With Mr. Baldridge's consent, may I interrupt to clarify that?

Mr. Baldridge: Certainly Mr. Kiendl.

The Court: I would like you to if that can be done.

Mr. Kiendl: The Pewee Coal Company case is referred to in Section IV at Page 35 of our brief and we say there:

"Defendant refers . . . as confirming the existence [fol. 1401] of a Constitutional power in the President to seize property during a national emergency."

I should have said that the defendant refers to the case of United States vs. Pewee Coal Company, 341 U. S. 114 (1951), as is pointed out at Page 57 of his memorandum.

We say in our memorandum:

"This assertion is made in the face of the incontrovertible fact that the legality of the taking—i.e., the question of the power of the executive to seize the property—was not an issue in the case, as specifically stated by the court below. (See *Pewee Coal Co. v. United States*, 88 F. Supp. 426, at Page 430 (Ct. Cl. 1950)."

The Court: Thank you for confirming my recollection.

Mr. Baldridge: As I say, whichever view was taken, compensation was granted and the seizure did occur without statutory authorization.

I do not think I need to further discuss the emergency situation which we submit existed and which is sufficient to justify, in these circumstances, the exercise of the President's inherent powers to prevent a national catastrophe by issuing the seizure order.

At the session yesterday, counsel for plaintiffs, Mr. Bromley for Bethlehem Steel Company particularly, having insisted that a statutory remedy was available to the Chief [fol. 1402] Executive; that the statute was passed with that specific purpose in mind and hence that route should have been taken rather than the inherent power of seizure right.

I say at the outset that where several remedies are available to an Executive and he chooses one rather than another, I do not think it is the concern of the Courts to decide that he should have taken a different route.

The function of the Court is to determine whether as to the route the President did take that that route so taken was actually legal—that is, when properly raised, as it is here or will be on a motion for a final injunction.

The Court: I thought they raised that point as an argument against your position that an injunction could be catastrophic.

They said that an injunction would not result in a catastrophe because there is a remedy available to prevent a strike, to-wit, the Taft-Hartley law.

That is what I got out of what they said.

I do not think they said that if the Executive had two

courses to pursue or that he could pursue that the Court could direct which one he should pursue.

Mr. Baldridge: They did not, your Honor.

The Court: I had no such view.

Mr. Baldridge: They did say that there was a statutory remedy which should have been followed rather than a route [fol. 1403] that the President took.

The Court: Yes, that is right; that is right.

Mr. Baldridge: Now we submit, your Honor, that the Taft-Hartley Act was not and is not intended to preclude the President from resorting to residual or implied powers.

The Taft-Hartley Act is persuasive rather than mandatory.

The President may appoint a fact-finding board and, upon receiving the report of the fact-finding board he may direct the Attorney General to seek an injunction.

The legislative history of the Taft-Hartley Act will show that the use of the word "may" was direct—and, incidentally, the House version was, first, "shall", but the Senate version always used the word "may", and the conference report adopted the use of the word "may" making the Taft-Hartley Act persuasive.

Another instance indicating that Congress recognized the power of the Executive to resort to alternative remedies in labor disputes affecting the national defense is illustrated by Section 18 of the Selective Service Act passed in 1914 and certain provisions of it are directly pertinent to this argument and sustain my view.

Also, the labor disputes provisions of the Defense Production Act of 1950 as amended are particularly pertinent. [fol. 1404] As we say in our brief, our position is not that the present order is based on either of these statutes, but that their enactment indicates that the Taft-Hartley Act was clearly considered not to be an exclusive remedy.

Those two measures to which I have referred were not followed for other reasons, because, administratively, they were thought not to be adequate to meet the situation that faced the country as of midnight on April 8, 1952.

The same is true of the Taft-Hartley Act.

It could be said that the situation would be remedied and that the President should have gone to the Taft-Hartley

Act because the Act provides that there may be an injunction against a threat to strike as well as an injunction against an actual strike.

But, with this matter under consideration for several months, and placed in the hands of the Wage Stabilization Board it must be remembered that in any negotiation there is a "give and take" period on either side; there is always the hope that before the last minute dead line, an agreement will be reached; it is always possible that at five o'clock in the afternoon the negotiators would be one cent apart; at seven o'clock in the evening they could be worlds apart while at eight o'clock they would have almost reached an agreement.

That is the normal history of labor management negotiations around the collective bargaining table.

Hence, it was not until very late in the evening of April 8th that it became apparent that the wage controversy in this industry would not be settled on a negotiation basis as between the management and the Union.

If the President at that time had gone the Taft-Hartley route, he realized that it takes time to prepare an executive order.

Then the fact-finding board must be convened and, unless their hearings and finding are a pure sham, particularly in a case that has these various elements of wage benefits, fringe benefits, and what not, careful consideration must be given by the board to the full disclosure of the facts before such panel on each side. It may be a week, two weeks, or a month before such a board could have reported its findings.

In the meantime, the strike would have occurred and would have gone on, as called at 12:01 a.m., April 9th. Steel production would stop and the defense effort and the national security would have been jeopardized in a very real sense, as is suggested by the affidavits supporting the Government's position, particularly those affidavits of Mr. Lovett and Mr. Dean.

We submit, your Honor, that all the results that could have been achieved under the Taft-Hartley Act were achieved by voluntary action prior to Government seizure [fol. 1406] at midnight on April 8th.

All that the Taft-Hartley Act provides for is the cooling off period of eighty days, during which cooling off period negotiations for settlement will take place.

In the facts of this case, the Union already had four times postponed a strike. They had waited ninety-nine days, nineteen days longer than they could have waited under the Taft-Hartley Act injunction and, at the end of the eighty days there would be nothing left but seizure in the event an agreement was not reached during the eighty day period.

We think that the Taft-Hartley Act certainly in spirit if not in letter was more than effectively complied with by the Union in the four-time postponement of the strike and the wait of ninety-nine days.

In this connection, your Honor, with your permission, I should like to read a portion of the letter that the Chief Executive sent to the Vice President a few days ago on this subject when the question came up as to whether there should be passed an amendment to a supplemental appropriation bill preventing the use of any funds by the Government, in that bill, for steel purposes.

I quote from Page No. 4192 of the Congressional Record of Monday, April 21, 1952—a letter from the President to [fol. 1407] the President of the Senate:

“Some members of Congress may feel that, in spite of all the steps already taken, the Taft-Hartley Act should yet be invoked. It appears to me that another fact-finding board and more delays would be futile. There is nothing in the situation to suggest that further fact-finding and further delay would bring about a settlement. And it is by no means certain that the Taft-Hartley procedures would actually prevent a shut-down.

Furthermore, a Taft-Hartley injunction in this situation would be most unfair, since its effect would simply be to force the workers to continue at work for another eighty days at their old wages—despite the fact that they have already remained at work for more than 100 days since their old contract expired, and despite the fact that the Government's Wage Stabilization Board has already recommended a wage increase. To freeze the status quo by injunction would,

of course, be welcomed by the companies, but it would be deeply and properly resented by the workers."

Now, in closing, your Honor, I should like to address myself to the limited prayer sought in these proceedings by United States Steel.

[fol. 1408] United States Steel argues that such an injunction, that is, an injunction merely against an increase in wages, would preserve the status-quo and not injure the public because the Union could not strike against the United States.

I submit, your Honor, if the Government is enjoined from taking the action it deems appropriate, that is, effecting an increase in wages and an increase in prices, both of which are contemplated, on the theory that the seizure is or may be unlawful, there is no assurance that the Union will not strike. As a matter of fact there have been three wild-cat strikes already, under the seizure. Under the circumstances if the seizure were declared unlawful, through the issuance of an injunction, the Union may well feel free to strike. The Government could not then invoke the Taft-Hartley Act, but, while no injunction is issued, we say that the plants are legally seized.

Any attempt of the Union to enjoin, under the Mine Workers theory could succeed only after long litigation and a long shut-down during which no steel would be produced.

Hence, your Honor, we say that an injunction against the wage increase may well create a worse situation than that which exists at the present time because it would give [fol. 1409] rise to the immediate possibility of a strike and,—against that, if such a situation occurred, the legal situation would be so clouded that it would be difficult for anyone to work out a remedy.

We think, your Honor, that upon a balancing of all the equities this Court should not throw this matter into further confusion but should withhold relief, if any be warranted to the plaintiffs, until a final decision on the merits of the case.

If you enjoin a price increase the industry can sit the situation out indefinitely.

They are in the same position now. In fact, their oral statement is merely a reiteration of what they have said so often before. Their policy was then, "no wage increase; no price increase."

Still they want no control of their plants, no real interference—they would have exactly what they want, if their limited prayer is granted, and they can afford to sit here and just wait.

The Court: Then, why are they here?

Mr. Baldrige: What?

The Court: If what you say is true, why are they here?

Mr. Baldrige: It is a game, I think, your Honor.

Mr. Kiendl: Some game!

Mr. Baldrige: While these court proceedings are going [fol. 1410] on preparations for them could be finally and properly made and the parties interested in wage and price aspects of the matter could be working, negotiations could be going on, particularly with experts in the field, and certainly reasonable men can work out something and the situation is not an insoluble one. We think that a great deal more uncertainty than now exists would be injected into the situation were your Honor to enjoin a price increase at this time.

Now, I cannot tell your Honor just what the recommended wage increase will be. I read yesterday from the testimony of Mr. Stephens, Vice President of the United States Steel Company before the Labor Committee of the Senate that the complete package, 20 cents, industry is willing to give (See Appendix A of this record, the last sheet appearing in the volume of this report).

Suppose the Government put in a wage increase on a package basis of 20 cents and your Honor would enjoin them. Then, that much progress toward resolving the differences, as between management and the Union, would be destroyed.

We just think it is not a situation in which the Court should inject itself because it would make an already difficult situation worse.

I might also say your Honor, that this question of a projected wage increase is not a "two-way street".

The day before yesterday, the Secretary of Commerce, [fol. 1411] on April 23, 1952, addressed the following let-

ter—and I should like to hand your Honor a copy of it—the Secretary of Commerce addressed a letter to Mr. Roger L. Putnam, Director of the Economic Stabilization Agency, which I will read. The letter is dated April 23, 1952, and is as follows:

“This will confirm the understanding which we reached in our meeting on Saturday afternoon, April 19, 1952, that you will prepare as quickly as practicable, and in a form suitable for issuance by me as an order, recommendations, coming within the scope of your functions as Administrator of the Economic Stabilization Agency, for changes in terms and conditions of employment which you believe I should put into effect in the steel industry at this time.

It is understood that you will consult with and secure the approval of the Attorney General as to the legality of the recommended changes under the terms of Executive Order 10340. Upon receipt of your recommendations, I shall promptly submit them to the President for his approval with the understanding that I will suggest to the President that he call upon you if he has any questions concerning the recommendations.

[fol. 1412] It is my further understanding that you will inform me of the basis upon which the steel firms now under my control may apply for price increases to which they may be entitled.

Finally, it is understood that I will make appropriate public announcement of the fact that I am relying upon you for explicit recommendations concerning changes in terms and conditions of employment coming within the scope of your functions as Economic Stabilization Administrator.

By working together in this manner, I believe that we can most effectively maintain uninterrupted production of steel for the national defense.”

I might add there again that this is a pretty clear indication that Mr. Sawyer is the alter ego of the President in this matter.

The Court: Would not that be considered as self-serving?

Mr. Baldrige: I beg your pardon?

The Court: I say: Would not that letter of Mr. Sawyer's be considered as a self-serving letter?

The date of the letter is April 23, 1952.

Mr. Baldridge: You can make an argument on a mechanical date. But, this is just the outcome of months of negotiations in an attempt to settle this rather serious controversy between management and the Union.

[fol. 1413] On the same date, April 23, 1952, Mr. Putnam, the Administrator of the Economic Stabilization Agency, addressed a letter to Mr. Ellis G. Arnall, Director of the Office of Price Stabilization, and I would like to read these two excerpts, your Honor, to indicate that, so far as the Government is concerned, this controversy is not a "one-way street" controversy.

Mr. Putnam, the Administrator of Economic Stabilization Agency, wrote, as I say, Mr. Arnall, Director of the Office of Price Stabilization, on April 23rd, the following:

"For some time the Office of Price Stabilization has been ready to issue a regulation to permit the steel industry to apply for price increases under Section 402(d)(4) of the Defense Production Act of 1950, as amended, the so-called Capehart Amendment. The preparation of this regulation was begun at the request of the steel industry but, as we both know, the issuance of it was held up several weeks ago at the request of that industry.

I do not think it is desirable to delay further the issuance of a Capehart regulation for steel. I believe it is incumbent upon us to make available to the steel companies the necessary machinery for obtaining the [fol. 1414] price increase to which they may be entitled, and to do it as promptly as possible."

I would like to call attention to one further thing, your Honor:

The day after the seizure occurred, the President sent a message to the Congress explaining why he took the action which he did take, and he asked the Congress that if it had different ideas he would welcome a consideration of them, and if Congress wanted to pass legislation in the premises he would be glad to consider it.

This is a letter from the President of the United States, dated April 9, 1952, and is addressed to the Congress of the United States; I quote from it as follows:

"It may be that the Congress will deem some other course to be wiser. It may be that the Congress will feel we should give in to the demands of the steel industry for an exorbitant price increase and take the consequences so far as resulting inflation is concerned.

It may be that the Congress will feel the Government should try to force the steelworkers to continue to work for the steel companies for another long period, without a contract, even though the steelworkers have already voluntarily remained at work without a contract for 100 days in an effort to reach an orderly [fol. 1415] settlement of their differences with management.

It may even be that the Congress will feel that we should permit a shut-down of the steel industry, although that would immediately endanger the safety of our fighting forces abroad and weaken the whole structure of our national security.

I do not believe the Congress will favor any of these courses of action, but that is a matter for the Congress to determine.

It may be, on the other hand, that the Congress will wish to pass legislation establishing specific terms and conditions with reference to the operation of the steel mills by the Government. Sound legislation of this character might be very desirable."

The President has not only taken it into his confidence the legislative branch of the Government but has asked their help, their assistance, and in the event they are interested has invited them to give him that help and assistance. They certainly are interested, in view of the large number of hearings being held at the present time both before the Committees of the House and the Committees of the Senate.

In order to give the Court some additional background, I would like to refer to a statement made by the head of the Office of Price Stabilization in his testimony on April

16th, before the Senate Committee on Labor and Public [fol. 1416] Welfare. It is not something that is relative specifically to the matter now before the Court but it will be helpful in focusing the background of the picture, I think.

Quite apart from what the steel companies may be entitled to under the so-called Capehart Amendment the stabilizing formula which was devised for the purpose of preventing inflation or holding it down provides that a concern may be eligible for increase in prices only when its net earnings fall below 8 per cent of the highest three years of the four year period from 1946 to 1949 and, in connection with that, I would like to read a statement of Ellis Arnall, Director of Price Stabilization, before the Senate Labor Committee on April 16, 1952, where he says:

"As the chart shows, the industry earned \$843,000,000, on the average, during the 1947-1949 base period. This represented a return of 18.5 per cent on net worth, or owners' investment. Taking 85 per cent of this rate gives a minimum rate of return under the Earnings Standard of 15.7 per cent on net worth. Applying this rate to current net worth would produce a current minimum earnings figure of \$936,000,000, shown as the last bar on the chart.

Actual 1951 earnings were \$1,918,000,000. Thus the [fol. 1417] industry could absorb cost increases amounting to a little less than a billion dollars, the difference between these last two bars."

I submit, your Honor, that in the circumstances in which we find ourselves before your Honor, with attempts being made by these Government agencies that have been working on this matter for months, there has been acquired a great deal of background and expert knowledge, and that your Honor ought to leave the matter just where it is and deny both the several motions of the plaintiffs for temporary injunction against seizure, as well as the oral application of United States Steel for a temporary injunction against a wage increase.

I thank you.

The Court: The Court will stand in recess for five minutes.

(Thereupon at 11:30 o'clock a.m. recess was had until 11:35 o'clock a.m., when the following occurred:)

[fol. 1418] Mr. Wilson: If Your Honor please, at the moment I should like to take up where I left off yesterday in anticipating, and accurately so as I did, the reliance of the Government upon the Myers case.

Before doing that I would like to say a word or two about this matter of the action being one against the President. I shan't spend but a moment on that.

I think there is no validity in the argument. I think Your Honor's observation yesterday of hundreds of thousands of suits against Cabinet Officers is contrary history to that proposition.

I think this idea that the President is an indispensable party in a situation where a man is acting as a trespasser is fully answered in *United States v. Lee* in 106 U. S., where that exact contention was made by the defendant, and refused to be accepted by the Supreme Court.

That, of course, has been brought up to date on the *Land v. Dolhar* case, in all of the force that existed in the *Lee* case.

But there is nothing to that proposition. I don't want to burden the Court with an argument that the President can be sued in a case where he is not being sued, but I would like to remind the Court of a sentence in *Mississippi v. Johnson*, and a sentence in *Kendall v. the United States*, which seemed to reflect some kind of a reservation by the [fol. 1419] Supreme Court to the effect that it is an absolute thing that, under no circumstances may the President be sued.

Now, as I say, I don't have to take the burden of that argument, but there are qualifications which have been indicated by the Supreme Court.

In *Mississippi v. Johnson* at page 498 the Court says:

"We shall limit our inquiry to the question presented by the objection, without expressing any opinion on the broader issues discussed in argument, whether, in any case, the President of the United States may be required by the process of this Court, to perform a

purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime."

I say that the Court was not willing in *Mississippi v. Johnson* to lay down the blanket, absolute rule which Mr. Baldridge argues.

Also in another case upon which he relies, *Kendall v. The United States*, which was a suit against the Postmaster General, we find this phrase employed by the Supreme Court:

"The executive power is vested in a President, and as far as his powers are derived from the Constitution, he is beyond the reach of any other department except [fol. 1420] in the mode described by the Constitution through the impeaching powers."

Now, of course, I don't know what the Supreme Court had in mind, but this again in an early case is an indication that the Supreme Court was not willing to announce the doctrines as broadly as that for which Mr. Baldridge argues.

In *Holzendorf v. Hay*, which is one of our own cases, reported in 20 Appeals here, that was a simple question of not being able to control the discretion of the Executive.

Marbury v. Madison was cited in support of it. That is all the case stands for.

So that I say that certainly under the *United States v. Lee*, and the cases which follow it, there is nothing to this proposition either from the point of view that this is a suit against the President or that the President is an indispensable party in this suit against Mr. Sawyer.

The Court: I haven't heard *Goltra v. Weeks* mentioned.

Mr. Wilson: That is in one of the briefs that has been submitted; yes, Your Honor.

The Court: I think it is relevant. Do you?

Mr. Wilson: Yes, Your Honor, I think so.

If Your Honor please, coming back to the point that I was urging upon Your Honor yesterday, these several Supreme Court cases which I relied upon should be directly [fol. 1421] disposed of. I disposed of *In re Neagle* and *In re Debs* upon the simple proposition that in those cases

the President was performing his power under the "take care" clause of the Constitution. It was aptly said by Judge Augustus Hand when he was sitting in the District Court in the Western Union Cable case in 272 Fed. page 311, affirmed by the Second Circuit in the same volume at page 893, that in referring to those cases, the *In re Neagle*, *In re Debs*—the Chinese Exclusion cases were added although they are not relied upon by the Government in this situation—Judge Hand pointed out that Congress had passed laws for the carrying of the mails in the *Debs* case and in the holding of the Circuit Courts, and the executive department was enforcing these laws or seeing that enforcement was not impeded.

They are not complicated cases. They are very simple propositions, easily disposed of in that way.

And the Prize cases also relied on by the Government are easily disposed of. There was an underlying statute. There was a ratification of the Act by Congress. It was essentially a war power as well. All of that is pointed out in one or more of the briefs which have been submitted to Your Honor. There is nothing in any of those three cases from which it could be argued that there is inherent power in the President. I doubt seriously if I can state [fol. 1422] it accurately that there is the use of the word "inherent" in any of those cases.

Now, as I was saying to Your Honor yesterday, I want to face very frankly certain statements of Chief Justice Taft in the *Myers* case. As I said to Your Honor yesterday I accurately anticipated Mr. Baldridge when he referred to the language of Chief Justice Taft that I read to Your Honor yesterday.

Now, it will be remembered that in that case the question was whether the President had the power to remove a postmaster without the consent of the Senate. The specific provision which was first considered was of course the power to appoint which carried with it the necessity of the approval of the Senate. However, as I said to Your Honor, the Chief Justice in reaching that decision in the case that the President had the power to remove without the consent of the Senate, did so upon the "take care" clause, based it upon the theory that the President could not perform all

of the executive services himself, that he needed reliable and competent assistants, and that when he had one who was not performing his duty, then he ran the risk of not exercising adequate power under the "take care" clause, and he had a right to remove him.

Now, it is true, as I said, and as Your Honor has been [fol. 1423] told, that there is certain language of the Chief Justice in the case about a general grant of power, and certain specifications that follow it, and certain limitations.

I want to go back into history for a few moments to appraise Your Honor, or at least remind Your Honor, of what I am sure Your Honor already knows, that this question of inherent power is not a matter which has arisen for the first time from the brief of the gentlemen of the Department of Justice in this case.

This problem of whether the President has inherent power was raised in the early days of our Republic, and was raised in connection with the proposition for which Mr. Baldridge argued here today, namely, that since in Article I where it says the legislative power is vested in the Congress, the words "herein granted" are mentioned. He said that those words do not appear, and they do not, in Article II having to do with the Executive, and in Article III having to do with the judiciary; and therefore that there are broad general unlimited grants of power in the second and third articles that are not in the first article.

I say that that very question was considered and debated in the early days of the Republic, and that undoubtedly the prevailing view was in support of our position that [fol. 1424] there is no great reservoir of power, that there is limited power, that the powers of the President are simply these which are given to him under the Constitution.

Now, having that in mind, I want to come to the Humphrey case which was decided after Chief Justice Taft was no longer on the Court, and which has a direct bearing upon the Myers case.

In the Humphrey case, as your Honor may recall—it is 295 U. S. at page 602—Humphrey was a Federal Trade Commissioner who had been appointed by President Hoover. His seven-year term expired in 1938. Shortly after President Roosevelt took office in 1933 he wrote to

Mr. Humphrey and said, "You and I don't see eye to eye in the field in which you function. Therefore, I should like to have your resignation."

Mr. Humphrey after some deliberation politely refused to submit his resignation, as a result of which the President removed him or thought he removed him.

Mr. Humphrey sued in the Court of Claims for the compensation to which he would have been entitled to for the remainder of his term. The Supreme Court sustained his executor's right to that compensation, because in the meantime Mr. Humphrey had died.

Now I should point out that in that case the Federal [fol. 1425] Trade Commission Act in Section 1 provided that the Commissioners could not be removed by the President except for negligence or deficiency or other misfeasance. None of these things applied, and the question was whether the President could remove him and whether the limitation in Section 1 upon the right of a President to remove was constitutional.

I won't take much time to discuss this case except to point out that the Supreme Court found, unlike the status of Myers, the Postmaster, found that Humphrey and the Federal Trade Commission did not perform executive but performed quasi-legislative and quasi-judicial functions; and therefore there was no occasion under the "take care" clause for the President to have had the power to remove him.

But the significant thing is this, and this will bring me in a moment to the nub of what I want to point out to Your Honor:

When the Humphrey case was decided, the opinion was written by Justice Sutherland. Justice McReynolds had written one of the two principal dissents in the Myers case. The three dissenting Judges in the Myers case had been Justice Holmes, Justice McReynolds, and Justice Brandeis. Justice Holmes wrote a short dissenting opinion. The others wrote very elaborate opinions. As a result all of [fol. 1426] the papers in the case encompassed some 250 pages in the Supreme Court Report.

The principal constitutional argument was advanced by the dissenting opinion of Mr. Justice McReynolds. While

the controversy centered principally around this power of the President to remove without the advice and consent of the Senate, which by the way had as Your Honor knows plagued our country as a controversial issue, almost from its inception, that in the case because of this dictum of Chief Justice Taft in which he unnecessarily reached over into a broader discussion which has been accepted by some students of constitutional law as dealing with the problem of inherent power, that was the occasion for Justice McReynolds' dissent to attack vigorously that approach to the situation.

So that when the Humphrey case was decided, and Justice McReynolds and Justice Brandeis were still on the Supreme Court—Justice Holmes was no longer there—the opinion of the Supreme Court came out this way in reference to the Myers decision. I am quoting from the Humphrey decision at page 626:

"In the course of the opinion of the Court, expressions occur which tend to sustain the Government's contention, but these are beyond the point involved and, [fol 1426] therefore, do not come within the rule of stare decisis."

The Government's contention in that case was for some kind of inherent power in the President.

I will continue with my quote:

"In so far as they are out of harmony with the views here set forth, these expressions are disapproved."

That was a unanimous opinion in the Supreme Court in the Humphrey case, and it is very interesting that at the very bottom of it Justice McReynolds in polite judicial language said, "I told you so, and I refer you to my opinion in the Myers case."

I say the result of the unanimous action of the Humphrey case has been to accept the doctrine of Justice McReynolds, in which he vigorously attacks this theory of inherent power in the President.

Now somewhere I have seen the claim of the Government that the remarks of Mr. Madison in the First Congress,

and of course we know that from the point of constitutional interpretation, the remarks of the members of the First Congress have been looked upon with great respect, and in the comments of Mr. Madison somewhere in that era it is claimed that he vouched for and supported the doctrine of inherent power.

I submit that he did not. I submit that Justice Mc-[fol. 1428] Reynolds has found the observations of Mr. Madison which are to the contrary. It is said in the opinion:

"Mr. Madison emphasized the doctrine that the powers of the United States are particular and limited; that the general phrases of the Constitution must not be expounded as to destroy the particular enumerations explaining and limiting their meaning; and that latitudinous exposition would necessarily destroy the fundamental purpose of the Founders."

I say, therefore, that Your Honor's study of this situation will convince you that even Mr. Madison was not a true advocate of the inherent power of the President.

I want to add to that, as Justice McReynolds has so accurately and clearly assembled in his dissent, that in the well-known debates of 1835 when again this question of whether the President's powers were expressed and only implied, or whether they were inherent, that Mr. Clay and Mr. Webster and Mr. Calhoun were all advocates of the proposition that there are no inherent powers in the President.

I should like to take the time, as much as I regret doing it, reading to the Court about a dozen or fifteen lines. I am quoting from Webster who states it far more eloquently and forcefully than I could ever hope to do. It is a quotation from Webster's Works in which he says this:

[fol. 1429] "He pointed out the evils of uncontrolled removals and, I think, demonstrated that the claim of illimitable executive power here advanced has no substantial foundation. The argument is exhaustive and ought to be conclusive. It is true, that the Constitution declares that the executive power shall be vested in the President; but the first question which then arises is, What is executive power? What is the degree, and

what are the limitations? Executive power is not a thing so well known, and so accurately defined, as that the written Constitution of a limited government can be supposed to have conferred it in the lump. What is executive power? What are its boundaries? What model or example had the framers of the Constitution in their minds when they spoke of 'executive power'? Did they mean executive power as known in England, or as known in France, or as known in Russia? All these differ from one another as to the extent of the executive power of government. What, then, was intended by 'the executive power'? Now, sir, I think it perfectly plain and manifest, that, although the framers of the Constitution meant to confer executive power on the President, yet they meant to define and limit that power, and to confer no more than they did [fol. 1429] thus define and limit. When they say it shall be vested in a President, they mean that one magistrate, to be called a President, shall hold the executive authority; but they mean, further, that he shall hold this authority according to the grants and limitations of the Constitution itself."

Now the burden in my argument in this connection, if the Court please, is that whatever dictum was indulged in by Chief Justice Taft in the Myers case hinting or squinting at the possibility of some inherent power, some unixed, indefinable, illimitable power in the President has been repudiated and disapproved by a unanimous court in the Humphrey case, which undoubtedly in doing so must have accepted the theories of Mr. Justice McReynolds as he expressed them in the Myers case in his dissent, and as he relied upon the statements such as Clay and Webster and Calhoun.

There are other quotes, but I shan't take the time, Your Honor, to quote them to Your Honor.

As Judge Hand said in the Western Union case:

"If the President has the original power sought to be exercised, it must be found expressly or by implication in the Constitution. It is not sufficient to say that he must have it because the United States is a

sovereign nation and must be deemed to have all cus-
[fol. 1431] tomary national powers."

The Court: What is the citation?

Mr. Wilson: 272 Fed. page 311.

So I say to the Court in conclusion upon this proposition there is no case which has really sustained the argument of the Government of inherent powers in the President. The powers are limited.

Maybe Article II does not use the phrase herein granted as does Article I, but the whole doctrine, the whole constitutional doctrine which has grown up is to the effect that these are granted powers to the President and they are not without some circumscription, and that under the first clause which says that the executive power shall be vested in a President, that is not some illimitable grant of power. But while it may have some vitality of its own, its vitality is read in connection with the specifications which follow.

Now, Justice McReynolds goes to the point of arguing that if the first section were a general grant of power, then why the specifications that follow, why refer to Commander-in-Chief, why refer to the pardon power, why refer to the appointment of ambassadors, and that sort of thing, if they were to delimit a broad general power which independently existed.

We say no such broad general power exists. We say [fol. 1432] there is no such doctrine as inherency in this situation. We say that the idea of implied power arising in principle the same way that the implication arises with respect to the legislative powers applies equally to the President under his powers.

Now, if Your Honor please, so much for the constitutional end of things.

I remember at the closing of the argument yesterday afternoon Mr. Baldrige was asked to bring to Your Honor one or more cases in which the power of the President to make the seizure under this or similar circumstances had been adjudicated by the courts. I didn't hear him come in here this morning with any cases. I heard him refer to the Merryman case on another point, and Your Honor has disposed of that far better than I could.

In the Government's brief on page 26 they refer to four cases; two Circuit Court of Appeals cases, and two District Court cases; in which they pick out the dictum to refer to the broad constitutional power of the President.

I say in the first place that it is dictum in every one of those cases, including the case in our own Court of Appeals. But besides that there was a statute in all of those situations. Besides that, in more than one of them there was an actual state of war existing.

I think these cases do not adjudicate the proposition for [fol. 1433] which Mr. Baldrige was arguing. And I didn't hear him this morning supplement those cases by any one that did.

I have the Court of Claims opinion in the Pewee case. And while I think that Mr. Kiendl disposed of that quite thoroughly this morning, I should like to read one sentence from the opinion of the Court of Claims.

"The material facts in that case are the same. (Referring to the United Mine Workers case.) The only difference is that in that case the seizure was under the War Labor Disputes Act, whereas this seizure was prior to the passage of that Act."

Here is the sentence I want to read.

"This, however, seems to us immaterial, since in this case the authority of the Secretary of the Interior to seize the mines is not put in question."

And that same condition of the record proceeded to the Supreme Court and controlled the Supreme Court in its decision affirming the Court of Claims.

I think I am about through, Your Honor. I would only sum up this constitutional situation, to go back to it for a moment, by saying that it is a pretty pitiful situation when the Government of the United States must come into this Court and say to Your Honor that, "We rely upon Sections 1, 2 and 3 of Article II of the Constitution, we rely upon [fol. 1434] implied, inferred, inherent and residual power. We think that the President has this power in time of peace or in time of war if the emergency is sufficient for it."

I say that that is not helping the Court. That indicates the greatest show of weakness that is possible on the part of the Government. They cannot sustain this seizure. They cannot help Your Honor to point to a single clause of the Constitution to sustain it. They can't point out a single authority of the courts to sustain it.

They simply throw the mass of the Constitution and the mass of these decisions at Your Honor and say, "Here they are. We say they hold a certain thing."

I say to the Court they don't hold those things. I say there is no Congressional, there is no constitutional, there is no theory upon which the power of seizure can be sustained in this case.

Mr. Kiendl: May it please the Court, I shall be very, very brief, and I hope confine my remarks strictly to rebuttal.

Mr. Baldrige opened his argument yesterday with a statement that the United States Steel Company had substantially conceded the legality of this seizure.

Now I know of nothing that I said or nothing that I intended to say that could be misinterpreted as a concession [fol. 1435] on my part that my client had conceded the legality of this seizure. Our position is directly to the contrary.

Mr. Baldrige yesterday raised some question about this affidavit of Mr. Stephens, the Vice President of the United States Steel Company, that I told your Honor I thought was one of the most important documents before you, and which I analyzed to some extent in my argument.

That same question regarding Mr. Stephens' affidavit was again raised this morning. The burden of Mr. Baldrige's argument was that in effect Mr. Stephens before the Committee on Labor and Public Welfare of the United States Senate had made an implied unconditional offer yesterday. He said a 12½ cent raise an hour would mean a 20-cent raise. I want to point out to your Honor what cannot be denied, that Mr. Stephens' testimony before that subcommittee is exactly consistent with the contents of his affidavit that I read in some detail to your Honor in my argument yesterday.

Now the portion that Mr. Baldrige read, and I would like the record to show that it is contained at Page 274 of

the stenographic transcript of the hearings on April 22, 1952, and the two little sentences that he referred to were these: Mr. Stephens came before that committee with a prepared statement, and he was reading from it, and he [fol. 1436] read this:

"They later increased their wage offer to twelve and a half cents. (That is the companies.) The settlement offered by the companies would increase their total employment cost by more than twenty cents per hour."

And Senator Taft, as this record conclusively shows, questioned Mr. Stephens about that portion of his statement as follows, and I read from page 298 of that record:

"Senator Taft. Mr. Stephens, you say on page 15 that they later increased their wage offer to twelve and a half cents per hour. So that an offer by the companies would increase their total employment costs by more than twenty cents an hour. Was that offer contingent upon any increase in price, or, was that an outright definite offer?"

And Mr. Stephens replied, and entirely consistent with his affidavit:

"So far as our negotiations are concerned, Senator Taft, we had no reference to price in the negotiations in which that offer was made. That offer was contingent upon the satisfactory composition of the issues. There were a great many issues in this case with which we were dealing, issues of management rights and many other things."

[fol. 1437] And that is consistent with the affidavit in which he says he was dealing with this as one over-all package, and not offering to settle any particular issue, but only all of them.

Now, Mr. Baldridge in his argument yesterday has given Your Honor the impression that the United States Steel Company is in the delightful, I think he said, "comfortable" position, where it can take a free ride here, no strike,

no wage increase, and then come into the Court of Claims and recover the money damages it has sustained as a result of this seizure.

This morning he says that the steel company can sit out that situation indefinitely. And when Your Honor says, "Why are they here asking for relief?" he had to rely on the almost childish suggestion that the United States Steel Company is here playing a game.

We are playing the most important game that the United States Steel Company or any other branch of industry in this country has every played. We are asking this Court to maintain the status quo in this litigation until there can be a full plenary trial on the merits.

And what is our position? I am authorized to tell Your Honor without any reservation that the United States Steel Company is prepared to go to trial on the merits of this case immediately. That is the suggestion that was [fol. 1438] made to Your Honor at a hearing before you on April 10, 1952. In that report it appears that the reason there was no immediate trial was because Mr. Baldridge took this position, and I read from page 8 of that transcript:

"Mr. Baldridge. If the Court please, we feel as the moving parties, that this is a most important matter for the courts to decide. Because it is an important and serious matter, as both sides agree, we don't feel we should be rushed into an early trial."

And on page 10 he said:

"This matter is suddenly laid in our laps as counsel for the Government. It is a matter of tremendous importance. We want to make as thorough a preparation as we can. Until we have studied it a little more, I am not in a position to make a commitment."

Now one final thing and I am finished, Your Honor.

Your Honor asked me yesterday, and you asked Mr. Baldridge yesterday, to find cases on this proposition regarding the express powers and the necessary and the implied powers of the Executive under the Constitution. I referred Your Honor then to our brief. I now tell Your

Honor we cover that point. we think completely and persuasively, in Point 4 of our brief at pages 10 to 13. But we find no specific case that we can add to that argument [fol. 1439].

Mr. Baldridge has found none. Now, why not? We think the answer to it is perfectly clear. It is because of the position that Mr. Baldridge took yesterday and again today when Your Honor asked him questions about the powers of the Executive, here is what transpired. I will only take a second to read it, Your Honor.

"The Court: So you contend that the Executive has unlimited power in time of an emergency?

"Mr. Baldridge: He has the power to take such action as is necessary to meet the emergency.

"The Court: If the emergency is great it is unlimited, is it?

"Mr. Baldridge: I suppose if you carry it to its logical conclusion, that is true."

Of course, it is true. And this morning Mr. Baldridge made the shocking and amazing assertion to this Court that the Constitution limited the powers of Congress. It limited the powers of the judiciary. But in no wise it limited the power of the executive. And that, it seems to me, in my humble opinion, gets us back to the point where we are necessarily coming to the existence of the royal prerogative under those very cases that he argued to Your Honor yesterday.

Now we say in conclusion that Mr. Baldridge's position [fol. 1440] acting for Mr. Sawyer in this case, is contrary to all accepted American democratic principles of government.

Mr. Tuttle: Your Honor, I intend to be very brief and confine myself strictly to rebuttal.

I want to say first that I think that the citation by Mr. Baldridge this morning of the Merryman case, the decision by Chief Justice Taney, was most unfortunate for his side of the case. There was a civil war. There was a power at time of insurrection and invasion to suspend the writ of habeas corpus. The military authorities seized the al-

leged traitor in his home and refused to turn him over to the judiciary on a writ of habeas corpus. ✓

Chief Justice Taney said this concerning the "take care" power section of Article II:

"With such provisions in the Constitution expressed in language too clear to be misunderstood by any case, I can see no ground whatever for supposing that the President in any emergency or in any state of things can authorize the suspension of the privileges of a writ of habeas corpus or the arrest of the citizen except in aid of the judicial power. He certainly does not faithfully execute the laws if he takes upon himself legislative power by suspending the writ of habeas corpus and the judicial power also by arresting and imprison- [fol. 1441] ing a person without due process of law."

Then Chief Justice Taney makes the acknowledgment which Your Honor referred to, that notwithstanding that was Constitutional law, and notwithstanding that the President had no inherent power under the circumstances except to act in aid of the judicial power which he was not doing, all he could do would be to submit a copy of his letter to the President for such advice which the President might wish to honor.

The much referred to Mississippi case can be disposed of in one sentence, it seems to me. That was a case where the President himself was named. An original bill was being filed by the State of Mississippi against Andrew Johnson, then President of the United States. The question solely was whether a bill with his name in it as a personal defendant would be received by the Supreme Court as long as that name was there.

*The Supreme Court said that this was the issue and the only issue:

"The Attorney General objected to the leave asked for upon the ground that no bill which makes a President a defendant should be allowed to be filed in this Court."

There was nothing about acting against those who claimed to be merely alter egos. The name of the President

[fol. 1442] of the United States was in the bill as a defendant, and all the Court held was that as long as that name was in the bill, the bill could not be filed. They didn't deal with what could be filed if the name was not there.

Now, just one thing about the reference to these words "herein granted" which Mr. Baldrige says, as I understood him, to be in the legislative sense and in the judicial sense but not in the executive sense.

He builds his vast structure of undefined and illimited power, among other things, on the absence of those words in Article II.

I call your attention to the fact that although he said—and I agree with him—that the judicial power and the legislative power are delegated and limited powers, those words "herein granted" do not appear in connection with the judicial power either.

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."

"The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

So that notwithstanding that sweep of judicial power [fol. 1443] in all cases, and notwithstanding the absence of the words "herein granted" I agree with Mr. Baldrige that the judicial power of the judicial branch of the Government is as much limited by the entire delegation theory of our Government and in this Constitution as is the legislative and the executive.

I call attention in that connection while we are considering parallels in that Article II dealing with the executive, there is no declaration that the executive power shall extend to all matters involving the common defense or the general welfare. That alone is found in Article I dealing with the legislative power.

Now in closing let me say this: I think that what has been said here and claimed by the Government raises a constitu-

tional issue as serious, is not more serious, than any that has confronted this country since the Scott decision.

This is the proposition and the steps by which it is built up. This seizure was without the authority of any statute. This seizure was without any express grant of authority in the Constitution. It is made not as an implied incidental act in performance of some express grant, but is rested on some inherent power to protect the common defense and the general welfare.

Then it is carried further because it is said that the [fol. 1444] President's decision is ipso facto because the President's decision is beyond judicial scrutiny, and the court has no jurisdiction. That decision of the President is immune from the judicial branch of the Government simply because it is the announcement of the President.

Then it is carried further. The next step is to say that immunity which he has extends all down the line of those whom he orders to perform what he has decreed. If it extends to the Defendant Sawyer, who is the sole defendant here, it would extend to his assistants. It would go down the line.

So that we have here advanced by the Department of Justice the proposition that in the name of general welfare, in the name of common defense, the President has a power not granted in terms by the Constitution, not a mere implication from any of the grants made in Sections 2 and 3 of Article II, but is based on the theory that what has not been forbidden to him by the Constitution is resident in him; that in the exercise of that power he is immune, his assistants are all immune.

Mr. Baldridge said yesterday that even if Mr. Sawyer were enjoined by this Court or any other court, the President could in effect snap his fingers at that and designate somebody else to carry out the order.

So on down the line as fast as the courts could issue [fol. 1445] injunction orders.

I don't recall a case in the history of this country, whether the history is judicial or whether it is administrative or by learned writers anywhere that that series of propositions have ever been claimed by anybody, even by our most aggressive Presidents.

He says that it is in aid of the theory of the enlargement of the executive power. Where are the limits? He says the only limit that he knows of is the ballot box.

Is that a remedy? In the hands of a strong executive with millions of persons in the employ of the executive department? Is that the remedy which the Founders of this Government looked to when they set up a Government of delegated power only, or did they look to the restrictions in the Constitution which reserved to the states and the people everything that was not delegated in express terms or by necessary implication in the carrying out of that which was delegated in express terms?

To say that the President in effect is the steward has implications as to the people of the United States that they are wards of the steward. That is a constitutional issue which rises far above the interests of any steel companies in this case or of any labor unions. That is an issue which concerns the whole future of liberty in this country because what can be done by a benevolent executive imposing [fol 1446] restrictions on himself can be done by one not so disposed later on feeling the urge for unlimited power and a conviction that all is well as long as he is the steward of the American people and that the courts are concerned with his idea of the welfare.

One sentence to sum up the judicial point of view which is about to be overthrown here if the Department of Justice has its way. That is in the case of *House v. Mayes*, 219 U. S. at page 281. Here is the authentic ring of the American tradition as laid down by the Founding Fathers:

"An extended discussion of the general question of constitutional law raised by the assignments of error is rendered unnecessary by former decisions of this Court. There are certain fundamental principles which those cases recognize and which are not open to dispute. In our opinion, they sustain the power of the State to enact the statute in question. (State of Connecticut.) Briefly stated, those principles are: That the Government created by the Federal Constitution is one of enumerated power,"—

"The Government, that takes in the executive, the legislative and judiciary.

"—and cannot, by any of its agencies exercise an authority not granted by that instrument, either in express words or by necessary implication; that a power may be implied when necessary to give effect to a power expressly granted."

It is a Government of enumerated powers. The President is an executive having only enumerated powers. He never was created as Chief of State or the "steward" of the American people.

The Court: I will recess until 1:30.

(Thereupon at 12:30 o'clock p.m. the Court recessed until 1:30 o'clock p.m. this date.)

[fol. 1448]

AFTER RECESS

(Pursuant to the recess heretofore taken the consideration of the above-entitled matter was resumed at 1:45 p.m. this date, when the following occurred:)

The Court: Mr. Westwood, is this mimeographed brief a duplicate of the typewritten brief formerly filed?

Mr. Westwood: Yes, sir.

The Court: With the exception of page 7?

Mr. Westwood: It is a duplicate all the way, Your Honor.

The Court: Well, why did you file this?

Mr. Westwood: Oh, well, because there are two dockets, Your Honor. We filed two complaints. Under one a twenty-day summons was issued; under the other a sixty-day summons was issued. I filed a second copy so that each jacket could have the brief in it.

The Court: So this mimeographed brief is identical with the typewritten brief?

Mr. Westwood: Identical with the typewritten brief, Your Honor.

The Court: But it is filed in a separate case?

Mr. Westwood: That is right.

The Court: One is against Charles Sawyer individually,

and the other is against Charles Sawyer, Secretary of [fol. 1449] Commerce?

Mr. Westwood: Yes, Your Honor. The wording in the complaint is the same in both cases. There is simply a difference in the issuance of the summons.

The Court: One went to his office and the other went to his home?

Mr. Westwood: Yes, Your Honor. In addition, if desirable, we have additional mimeographic copies, if they would be convenient for Your Honor's use.

I assume one is enough.

The Court: Yes.

Do you have some rebuttal?

Mr. Day: No, Your Honor.

The Court: Mr. Bane?

Mr. Bane: No, Your Honor.

The Court: Do you wish me to take up the Lavino case now?

Mr. Baldrige: Before you do that, Your Honor, may I have about two minutes?

The Court: All right.

Mr. Baldrige: There are about two cases in the Government memorandum on the taking power, that I neglected to call to Your Honor's attention this morning. They deal with the Government's power to take in the absence of statute. Those are the cases of United States v. Russell, [fol. 1450] 14 Wall 623—

The Court: Those two are in your brief, are they not?

Mr. Baldrige: Yes, they are, Your Honor. But I just wanted to highlight them because they are rather important on this point.

The Court: All right.

Mr. Baldrige: The other is United States v. Pacific Railroad, decided at 120 U. S. 227.

The Court: That is in your brief also?

Mr. Baldrige: That is correct, Your Honor.

Then I call Your Honor's attention particularly to the quote from the Russell case in Footnote 47 at the bottom of page 53 of Government's memorandum.

The Court: On the dissenting opinion? Is that the one you mean?

Mr. Baldrige: No, Your Honor.

The Court: Oh, the Russell case.

Mr. Baldrige: Yes, Your Honor. Footnote 47, the bottom of page 53.

Then one further observation, Your Honor. I think the remarks of plaintiffs' counsel in reply but emphasize the fact that Your Honor should not decide the constitutional question on these particular motions.

Finally, I want to say that we had an emergency situation here. Somebody had to deal with it. The legislative [fol. 1451] rule was too slow. As of April 8th, midnight, the Taft-Hartley rule was too slow. In either event, there would have been an indefinite stoppage of steel production.

Are we to say, then, that there is no power in Government any place to meet as serious a situation as this, when it confronts the security of this nation?

The Court: Then you assail the efficacy of our Government procedures set up by the Constitution?

Mr. Baldrige: I beg your pardon?

The Court: You assail the efficacy of our Government procedures set up by the Constitution?

Mr. Baldrige: Not at all, Your Honor. I just say, to have employed them on the night of April 8th would have resulted in a strike which would have stopped steel production which is so necessary to the national defense.

The Court: Do you think that is an answer to my question?

Mr. Baldrige: Well, I am just pointing out, we think that the Executive had the power, and it seems passing strange to say that faced with such a grave situation of national concern there is no power any place in Government to meet it. We think there was and is.

The Court: You have lack of confidence in the procedure set up by the Constitution to deal with an emergency situation [fol. 1452]?

Mr. Baldrige: No, I do not, Your Honor. I just say that as of midnight on April 8th this seizure procedure appeared to be the only effective way to avoid a strike and to avoid a cessation for an indefinite period of production of steel necessary to national security and national defense.

The Court: Well, we have had crises before in this country, and we have had governmental machinery that was adequate to cope with it.

You are arguing for expediency. Isn't that it?

Mr. Baldrige: Well, you might call it that, if you like. But we say it is expediency backed by power.

The Court: All right, thank you.

All right, Mr. Childs.

Mr. Childs: May I proceed, Your Honor?

The Court: Yes. This is the Lavino case?

Mr. Childs: Yes, sir.

ORAL PRESENTATION ON BEHALF OF E. J. LAVINO & Co.

By: Randolph W. Childs, Esquire.

Mr. Childs: I wish to thank the Court for the courtesy of permitting me to address this Court, because I sense that history is being made in this court room.

I appear on behalf of the E. J. Lavino & Co., which we claim is not engaged in the steel industry and not engaged [fol. 1453] in a labor dispute or controversy.

I shall not argue two of the points contained in our statement of points. One of them relates to the right of the Court to enjoin Charles Sawyer, and the other relates to the great constitutional question that has been argued yesterday and today.

With respect to that constitutional question, however, I cannot refrain from saying that it seems to me that the argument of the Attorney General of the United States, which as I understand it is that the President has unlimited and uncontrollable powers to act in an emergency of his proclamation, proves too much, because it converts him from an executive with limited powers to a ruler with absolute power against whom there is no remedy, in the language of the Attorney General, except by the ballot box and impeachment.

Experience on this hemisphere has shown that a strong ruler will dispense with even those safeguards.

I might also say that I have heard it said that the Constitution of the United States is what the Justices say it is. But today was the first time I ever heard it said that the

constitutional powers of the President are what the President says they are.

Getting down to this particular case, I want to argue only one point, and that is, irrespective of whether the [fol. 1454] Executive Order is valid or invalid it is not applicable to this plaintiff, and if construed to be applicable, is invalid as to him.

This Executive Order 10340 contains two recitals, and they are very brief, among others:

"Whereas a controversy has arisen between certain companies in the United States producing and fabricating steel and the elements thereof and certain of their workers represented by the United States Steel Workers of America, CIO, regarding terms and conditions of employment; and

"Whereas the controversy has not been settled through the processes of collective bargaining or through the efforts of the Government, including those of the Wage Stabilization Board, to which the controversy was referred on December 22, 1951, pursuant to Executive Order No. 10233, and a strike has been called for" and so forth.

Now, what are the facts regarding this plaintiff?

In the first place, the plaintiff does not produce steel. It is not a part of the Steel Industry. At the utmost it might be said to be a supplier to steel companies, and there are many suppliers, some of whom have contracts with the Steel Workers whose plants were not seized.

[fol. 1455] What does E. J. Lavino & Co. produce? It has three plants. One is a basic refractories plant at Plymouth Meeting, Pennsylvania. That plant produces refractories which are used for lining furnaces, and it has many customers outside the steel industry.

There are two other plants, one at Sheridan, Pennsylvania, and one at Lynchburg, Virginia, which produce ferromanganese.

The principal competitors of Lavino, outside of a couple of steel producers in the case of ferromanganese, are not in the steel industry, and their workers, their hourly workers, are not represented by the Steel Workers.

The classification, as shown by the affidavit of Mr. George P. Gold, filed yesterday or the day before, of the wage classifications are entirely different. There is a small area where in connection with furnace operations there is some relationship to the wage classifications of the employees of Lavino and those of the Steel Workers, but even there there are differences in job content.

Historically Lavino has never participated in collective bargaining with the Steel Workers in conjunction with the steel producers. It has never been a part of any nationwide bargaining. Its contract expires not December 31st as in the case of the steel producers, but January 31st.

[fol. 1456] No settlement of the steel companies would determine the issues that would exist as between Lavino and its workers. Another thing is, referring to price relief, that obviously no price relief which can be given to steel companies will be applicable in the case of Lavino, because some of its most important ingredients, for example manganese, are imported from countries which are not subject to price control.

So much for the nature of Lavino's business.

Take the labor controversy. Our contract, as I say, expires January 31, 1952. It was not until March 21st that Philip Murray sent us a telegram saying that he was ready to engage in collective bargaining negotiations with us, and that the chief of his bargaining committee would get in touch with us. He never did get in touch with us.

As of April 4th the local in our Plymouth Meeting plant posted a notice, the substance of which—I guess rather than give the substance I had better give the exact notice from the brief. It says this:

“Contract negotiations between E. J. Lavino & Company and Local No. 3216 will commence Tuesday or Wednesday of next week. In the event a strike takes place in the basic steel industry on April 8th, employees at E. J. Lavino & Co. will not be involved.”

On April 7th we received from Mr. Murray a letter which he had written on April 4th stating to us that a strike would be called in our plant at 12 o'clock April 8th, and that is the

first intimation we ever had of any labor controversy, if you would call controversy something that had not been the subject of discussion between employer and employee in this whole situation.

I suggest that it is very absurd for the Government to proceed against E. J. Lavino & Co. under an order based on a statement that there was a labor controversy pending between Lavino and its workers, or representatives of its workers, and long drawn-out negotiations had taken place; that this labor controversy which never existed could not be settled through the ordinary means of conciliation and so forth.

The fact that there was no labor controversy was set forth in the complaint, or was verified in the affidavit of one vice president and the affidavit of Mr. Gold who was vice president in charge of labor relations and other things. It was only the day before yesterday that we learned from the defendant's affidavit, that said this matter has been referred by the President on December 23, 1951, to the Wage Stabilization Board, that any claim was made that we were [fol. 1458] party to the controversy. Whereupon we called up Mr. Taylor in the office of the Department of Justice and he was very courteous and gave us a copy of a letter written on the stationery of the White House on December 29, 1951, giving a list wherein it was said there was a labor controversy pending between the company and the steel workers, and that was referred to the Wage Stabilization Board:

Now, here is the important thing, Your Honor: We had no knowledge of that letter until Mr. Taylor advised us of it the other night. In fact, I would not know it existed except that I have implicit faith in anything Mr. Taylor told me over the telephone.

We have no knowledge of that letter. It was not sent to us by the President. It was not sent to us by Mr. Feinsinger, and it was not sent to us by the Steel Workers.

My contention is that the letter therefore is without any effect whatsoever.

I am not going to take up the time of this Court to argue that due process requires notice, and so forth. I think it was absolutely meaningless.

Suppose, for example, that there had been no controversy at all with any employer, and the President had made a proclamation, or statement saying there was a controversy. He could not manufacture one.

[fol. 1459] The Court: He could not what?

Mr. Childs: I say he could not manufacture a controversy, because none ever existed.

The Court: The Attorney General claims that the President has unlimited powers.

(Laughter).

Mr. Childs: Well, with all due respect, I think that argument is something like my suit. I could not get a taxicab at noon and it is all wet.

(Laughter)

We have a courteous letter from Mr. Sawyer in which he refuses to return possession of our plants to us as we had asked, and he says the reason he refused to return possession is that he cannot be assured that a strike will not go on if he turns the plants back to us.

While Mr. Sawyer is courteous, I think he is also quite paternalistic in his attitude, because the real question is whether he seized our property lawfully or unlawfully. If he has seized them unlawfully, then we want them back again.

Just one word about irreparable injury in our case. I call Your Honor's attention to the fact that we have competitors, particularly in the basic refractories field, whose workers are not represented by the Steel Workers. Obviously if the Secretary of Commerce stays in possession, [fol. 1460] increases our wage rates, and so forth, we are going to be put at a distinct unfair disadvantage with respect to these competitors, who are represented by different unions; that is, we deal with unions whose contracts have not expired.

Secondly, on the matter of relief there is one thing applicable to our case and that of the steel companies, and that is, instead of sitting around the bargaining table having concessions made and considered, and counter concessions made, if the Government imposes certain terms

then that fixes the level at which collective bargaining agreements start, and it means that for all time that level is set and we the employers are deprived of that great right of collective bargaining.

For all the reasons advanced in our moving papers, in our complaint, we ask the Court to decree and direct Charles Sawyer to return our plants to us, in order that we may go on about our business, in order that we may sit down with the representatives of our employees free from the fetters of this lawless and intolerant Government seizure.

Mr. Baldridge: Your Honor, when the President referred the wage dispute to the War Labor Board on December 22, 1951, he appended a list of the steel companies, some of them mills, some of them war producers, some of them [fol. 1461] fabricators, and some in other classes, which he had been advised were in a wage dispute with the United Steel Workers Union. Upon receipt of a copy of Mr. Gold's affidavit which sets out about what counsel has indicated here, we checked with Secretary of Commerce Sawyer to see whether he would be in a position to release this particular company.

At the time the seizure took place, in order to cover everybody, undoubtedly there were some companies that were not having wage difficulties. Since the seizure a number of companies have been released from the seizure order because it has been found upon investigation that they were not having wage troubles with the unions.

So Mr. Sawyer gave an affidavit on April 23rd, when we called this matter to his attention. It is on file as a matter of record in this case. In it he says in paragraph 5:

"On April 12, 1952, I excluded from the operation of the aforesaid Order No. 1 all plants, facilities and properties other than the Plymouth Meeting plant and Sheridan plant in Pennsylvania, and the Lynchburg plant in Lynchburg, Virginia, of the E. J. Lavino Company.

"After consideration of statements received from [fol. 1462] E. J. Lavino & Co. and from United Steel Workers of America, CIO, I have formed the judgment that at Plymouth Meeting, Sheridan, and Lynchburg plants strikes will take place in the event that the

plants are returned to E. J. Lavino & Co. As the purpose of Executive Order 10340 is to protect the interests of national defense by providing uninterrupted forged steel and steel products, I have refused to return possession of these plants to E. J. Lavino & Co. at the present time."

Now, we are willing to do this additional check, if Your Honor please. We will check again with the Secretary and let Your Honor know within twenty-four hours whether his views with respect to the situation surrounding this plant are the same today as they were on April 23rd. If the Secretary feels that the situation is such that the company can be released, then we have no objection to the motion of the company.

Mr. Childs: I might say that I hope that he will think that they should be released, and that you will so advise His Honor. But in the event he does not feel that way about it, I still press for the release of our plants directed by this Court.

I would like to hand up a typewritten copy of our [fol. 1463] "Memorandum Re Effect of Preamble in Executive Order 10340."

(Handed up.)

I think I have made it clear that there was no controversy and therefore this order should not apply to us.

Mr. Baldridge: I do not like to press the matter too far, Your Honor—

The Court: Anything that is of assistance to me I welcome, Mr. Attorney General.

Mr. Baldridge: Thank you, Your Honor.

Your Honor's statement a moment ago that the Attorney General has insisted that the Executive has unlimited powers—the argument we make here has been directed to this sole point on power. That is, that in the circumstances of this particular case there is inherent power in the Executive to seize.

Now, we are not called upon in these proceedings to say that the President has that power under any and all cir-

cumstances. We do say that in circumstances such as exist in this case he has the inherent power to seize and he did seize.

The Court: Anything further, gentlemen?

(No response.)

The Court: I shall take the case under submission and give it attention to the exclusion of any other court business. When I am ready to file my decision I shall notify the [fol. 1464] Clerk's office and one hour thereafter I shall file the decision. Counsel, therefore, are only required to keep in touch with the Clerk's office in order to be present when the decision is filed.

The Clerk's office might also advise the press room so that the press can call there if they so desire.

I want to take this occasion, gentlemen, to thank you for the assistance you have given me in this case and the great amount of research that you have done. I appreciate it very much.

The court will now stand adjourned until return of the Court.

(Thereupon, at 2:05 o'clock p.m. the instant hearing was concluded.)

[fol. 1465]

Reporter's Certificate

(omitted in printing)

[fol. 1480]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

TRANSCRIPT OF PROCEEDINGS—Filed May 6, 1952

Washington, D. C.,
Wednesday, April 30, 1952.

PROCEEDINGS INCIDENT TO:

- (a) The signing by the Court of Preliminary Injunctions; and the
- (b) Notice of Appeal; and the
- (c) Application for Stay.

The Court having on April 29, 1952, filed in the office of the Clerk of the Court its opinion herein, as more particularly appears in the records of the Clerk of the Court, and [fol. 1481] counsel for the parties having communicated to the Court their desire to appear for the purposes herein, before set forth, the said counsel at 10 o'clock in the forenoon on Wednesday, April 30, 1952, did appear in open court

Before Honorable David A. Pine, Judge of the United States District Court for the District of Columbia, there being

Present: The same parties, by their same counsel as appeared on Thursday, April 24, 1952, and Friday, April 25, 1952, and there were had the following

PROCEEDINGS

The Court: Do you wish to address the Court?

Mr. Wilson: May it please the Court: Pursuant to the opinion of your Honor, filed yesterday, counsel for all of

the plaintiffs are here this morning to submit an order for a preliminary injunction.

The orders are essentially uniform; I think such variations, if any, as appear in any of them are quite immaterial, perhaps the change of a "singular" to a "plural" expression, or something of that sort.

The one possible exception perhaps will be that about which Mr. Westwood will address you, having to do with the United States Steel Company, and having to do with the [fol. 1482] adopting by the United States Steel Company of the idea suggested in the last paragraph of your Honor's opinion.

We have submitted these orders to the gentlemen from the Department of Justice, before midnight last night, and we have not varied very much in our final writing of it.

In the three cases in which two suits have been filed, that is to say Youngstown Sheet and Tube Company, et al., Republic Steel Corporation, and United States Steel Company, the parties are submitting identical orders in both cases.

Your Honor will probably recall that in each of those three instances, that is to say, in respect to each of these three plaintiffs, in one case Mr. Sawyer is sued as an individual and in another case he is sued as an individual and as Secretary of Commerce.

Your Honor will remember that there was some question about the time in which answer could be made, and I wish to state to the Court that I was served this morning in the Youngstown case with a motion to dismiss or quash the case because of the twenty day summons, which was served in the earlier of the two cases. However, that is a matter not before you and that can be left to be disposed of, without prejudice, in the future.

Since the two cases are pending, we deem it advisable, subject to your Honor's approval, to submit identical orders in both cases—

[fol. 1483] The Court (interposing): What do you have to say about the bond?

Mr. Wilson: We would like to submit this to your Honor, in all seriousness:

We gave that very careful and great consideration last evening and concluded that what was needed here was a

formal compliance with the rules and, in that situation, if your Honor will agree with us, we believe, that a nominal bond is all that is required under the circumstances and, as I say, we have given very, very serious thought to that and we submit that the bond should be in the penalty of one hundred dollars.

The Court: Who else would like to be heard?

Mr. Westwood: May it please the Court: On behalf of the United States Steel Company we filed in the Clerk's office, immediately after reading your Honor's opinion, a request for leave to withdraw the verbal amendment made to our motion for a preliminary injunction, and we served on the Government's attorney last night a copy of that request.

We have drawn the proposed order in the same form as that in which the Youngstown Sheet and Tube Company have drawn their order, and we have inserted a phrase, right at the beginning, after the reference to the motion for a preliminary injunction, that the plaintiff, having with- [fol. 1484] drawn its verbal motion to amend the original and written motion, now wishes to make that formally, and, with your Honor's leave, I hereby withdraw the verbal amendment.

We have given Government counsel a copy of the form of the order that we are submitting to your Honor.

This (referring to a paper writing handed to the Court) is the proposed order in one suit, and this (referring to another paper writing) is the proposed order in the other suit.

As Mr. Wilson has said, we have two complaints.

The Court: Except for the one clause, your proposed order is identical to or with the order proposed by Mr. Wilson.

Mr. Westwood: Yes, your Honor unless there be a "plural" expression in place of a "singular" expression.

The Court: What do you have to say about a bond?

Mr. Westwood: We believe, as does Mr. Wilson, your Honor, that this is the kind of situation where the damage to the defendant, as a result of a wrongful issuance of an injunction, would not be other than nominal.

We have endeavored to make some search of the cases, your Honor, and just do not find anything in the cases that

seemed to us suggestive one way or the other in reasoning the matter out. They do not appear to say much about it, but there can be no possible significant damage to the [fol. 1485] defendant.

Mr. Broun: On behalf of Bethlehem Steel Company, and others, in Civil Action No. 1549-52, I now hand up to you a form of order that is I think identical, in substance, with the one presented by Mr. Wilson in behalf of the Youngstown Sheet and Tube Company, et al.

That is just a copy (referring to a paper writing handed to the Court) but the original will be placed before your Honor.

The Court: Do you have the same conditions with respect to bond?

Mr. Broun: As to that, I agree with what Mr. Wilson and with what Mr. Westwood said, and that is that we believe, in the circumstances of this case, that there is no indication or likelihood of any damage resulting to the defendant, other than a nominal damage, if, indeed, there is any likelihood of damage to him at all; particularly in the light of your Honor's ruling.

We think that the bond should be nominal.

The Court: Anyone else?

Mr. Bane: In behalf of Jones & Laughlin Steel Corporation, I ask the Court to enter an injunction identical to that presented by Mr. Wilson on behalf of the Youngstown Sheet and Tube Company.

In presenting an order in the matter now before the [fol. 1486] Court I wish to say that I agree entirely with what Mr. Wilson has said and with what Mr. Westwood has said.

I think that the bond covering any damages cannot possibly be large in this case.

I cannot see how, in any circumstance, Charles Sawyer as an individual or as Secretary of Commerce could have any claim of any kind.

The Court: Mr. Tumulty?

Mr. Tumulty: Your Honor, on behalf of Armco Steel Corporation and on behalf of Sheffield Steel Corporation I hand Your Honor a form of order which is substantially the same form of order as that handed to you by counsel for the Youngstown Sheet and Tube Company, et al.

As far as the question of bond is concerned, I believe my position is exactly the same as that expressed by the counsel for the other plaintiffs, and we feel, as they do, that a nominal bond is sufficient to cover the situation.

The Court: Mr. Boyd?

Mr. Boyd: If your Honor please, on behalf of the Republic Steel Corporation, I hand you orders identical in form with those previously handed to your Honor, in both cases in which Republic Steel Corporation is plaintiff, being Civil Action No. 1539-52 and Civil Action No. 1647-52.

I think Mr. Wilson has correctly stated the position applicable to Republic Steel.

[fol. 1487] In respect to the bond, the rule makes it clear I think that the bond is designed to indemnify the defendant for any losses that he may sustain, and I submit that, in these cases, the defendant cannot suffer any losses and I submit, accordingly, that a nominal bond would serve all the purposes of the rules.

I do not understand that the rule contemplates even any provision for costs and for that reason I do not think the item of costs should be considered.

The Court: He would not lose any salary?

Mr. Boyd: I do not think so, your Honor.

The Court: And he would not have to pay any attorney's fees?

Mr. Boyd: No. The Department of Justice, I take it, will serve him without any compensation.

The Court: Mr. Peacock?

Mr. Peacock: If the Court please, I have an order identical to that filed by Republic Steel except that after "in consideration" there has been inserted "the pleadings herein."

On the bond, I say "Amen".

The Court: Is there anyone else to be heard for the plaintiffs?

(There was no response made by any of counsel at the Bar.)

[fol. 1488] The Court: Now, Mr. Attorney General, do you have any objection to the form of the order?

Mr. Baldrige: No, your Honor; we do not.

I suspect that each of the orders for a preliminary injunction are substantially identical. We have looked over two or three, but we are advised by counsel for the plaintiffs that they are substantially identical.

We have no objection.

The Court: What do you have to say about the bond?

Mr. Baldridge: Well, your Honor, we do not think that damages in this case are nominal, as suggested by the plaintiffs.

We think that the damages are incalculable.

The Court: To Mr. Sawyer personally?

He is the defendant.

Mr. Baldridge: To Mr. Sawyer and to the principal whom he represents.

The Court: Who is that?

Mr. Baldridge: The President of the United States.

The Court: How can he be damaged personally?

Mr. Baldridge: We are engaged in a tremendous defense effort.

A strike has occurred as a result of the proceedings here.

As long as the strike lasts production for the defense [fol. 1489] effort will be stopped.

I do not think it is possible to calculate the end result in damages.

Further, in the—

The Court (interposing): But I have ruled Mr. Attorney-General, that the President is not a party to this case.

Mr. Baldridge: I know, your Honor.

The Court: And you say that the President is entitled to damages if this injunction is wrongfully issued?

Now, what is the damage to him?

Mr. Baldridge: We think, your Honor, that the damages go further than that; they run to the protection of the country in this particular period of emergency.

But, as I was about to say—

The Court (interposing): I am sorry that I interrupted you.

Mr. Baldridge: In the interest of expedition in the handling of the case from here on in the Court, while we think the damages are incalculable, we are not insisting that the Court take time to consider our position in the matter.

We do think that because the damages are incalculable, for the reason stated, that the Court should look with favor on the defendant's application here for a stay.

I should like to present that to your Honor at this time. [fol. 1490] The Court: If I sign these orders, then I think your motion for a stay would be in order.

Mr. Baldridge: If your Honor —

The Court (interposing): I am making the bond one hundred dollars on the assumption that the only requirement is that I obey the rules which require the bond but, under the present circumstances, I am of the opinion that, so far as Mr. Sawyer is concerned, he is not in a position personally to suffer any damages whatever and, therefore, in compliance with the rule, I shall make the bond \$100, which is only a formal compliance.

(At this point the Court signed certain papers before it.)

The Court: Your represented Youngstown Sheet and Tube Company, did you, Mr. Wilson?

Mr. Wilson: Yes.

The Court: I shall not read more than one order presented to me in the case of Youngstown vs. Sawyer, in Civil Action No. 1635-52, and I will rely on the assurance of counsel, as members of the Bar, that the other orders submitted are identical, or substantially identical.

If there is any question about that being so, I will read each one of them.

Is that assurance given me?

Mr. Broun: Yes.

Mr. Westwood: With the exception of the point I indicated [fol. 1491] cited in connection with United States Steel.

The Court: All are identical with the exception of those in the United States Steel Company cases.

Mr. Broun: Yes.

Mr. Westwood: That is correct.

I will read this one over (indicating a document in the hands of the Court).

The others are substantially the same.

Mr. Broun: Yes, your Honor.

As I see it, the only difference is the clause in the order submitted by the United States Steel Company that: the plaintiff having withdrawn its verbal motion —

Mr. Westwood (interposing): That is correct.

The Court: Gentlemen, pursuant to the rule, normally, findings of fact and conclusions of law are necessary, but I think that my opinion probably covers all the conclusions of law and perhaps all the findings of fact that are necessary and my opinion can serve as a record of findings of fact and conclusions of law.

Is that correct?

Mr. Wilson: Just to corroborate that—and we deliberately considered that and considered Rule 52 having to do with findings of fact and conclusions of law,—I say that your Honor's statement is correct.

Rule 52 now contains this language:

[fol. 1492] "If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein."

Also, in the preamble of the order we accept that interpretation of the rule because we take it that you have made findings of fact and conclusions of law.

The Court: Do you think the rule, then, requires detailed findings as to the irreparable features of the law? I did not give any detailed findings, because of the opinion.

You don't think that that is necessary?

Mr. Wilson: That is our interpretation and that is what we read there.

You say, in your opinion, your Honor:

"I first find as a fact, on the showing made and without burdening this opinion with a recital of facts, that the damages are irreparable."

That is, in our view, a finding of fact that there is irreparable injury.

The Court: Are all others in agreement?

Mr. Brown: We are all in agreement; I think I can say; we are in agreement, not only as to the irreparable damage, but all other essential facts and allegations of fact, and conclusions of law.

I think the opinion contains a sufficient statement of findings of fact and conclusions of law, and that the rule is [fol. 1493] met.

The Court: Does the defendant have any other view with respect to the findings of fact?

Mr. Baldridge: No, not under the Rule. I think the statement is a statement of findings of fact and conclusions of law.

The Court: Now, Mr. Baldridge, I assume you wish at this hearing to make a motion for a stay.

First I will pass on the appeal to the Circuit Court of Appeals.

That will be received and duly filed.

Mr. Baldridge: Yes.

The Court: Now what is before me?

Mr. Baldridge: Second, the application for a stay of the orders granting the preliminary injunction.

As to that, I have only two matters to add as to the basis of the application:

One is that a work stoppage in the steel industry will immediately jeopardize and imperil the national defense and the defense of those joined with this nation in resisting aggression; and,

Second: That the head of the United Steel Workers of America, C.I.O., has announced that such work stoppage will immediately result if the order appealed from herein is not stayed.

[fol. 1494] According to the best information we have at the moment a strike in the steel plants throughout the country has been called.

The Court: May I have your application?

Mr. Baldridge: Yes (handing a document to the Court).

The Court: Your applications will be received and filed.

Mr. Baldridge: And I would like to hand up to your Honor a consolidated form of order on the defendant's application for a stay.

In the "order" portion there is a blank as to whether it is granted or denied.

The Court: What suggestion as to terms do you propose, if any?

Mr. Baldridge: I do not understand.

The Court: I think the rules provide that when a stay of an injunction is granted the Court may make such

conditions and terms as he believes to be in the interest of justice.

Do you have any suggestions at this time?

Mr. Baldridge: Not at this time, your Honor.

The Court: Supposing I look at that rule and see what it says.

It is Rule 62 (c):

"When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the Court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party."

That is the one I had in mind.

Do you have any suggestion as to that at this time?

Mr. Baldridge: No, your Honor, except this matter is of such tremendous importance that we urge your Honor to rule promptly—we would hope immediately—upon our application for a stay, because if your Honor is not disposed to grant such a motion, then we should like to seek such relief elsewhere, and, in view of the very critical situation created by the nationwide strike, we urge your Honor to give us an immediate ruling on the application, as prompt a ruling as is consistent with the consideration of the matter.

The Court: I will hear the other side.

Mr. Wilson: Speaking so far as Youngstown Sheet and Tube Company, et al., is concerned, we oppose the granting of a stay pending an appeal.

We think this is not the kind of a case where, pending an appeal, there would be mooted any pending questions, and we think on the question of the balancing of the equities that your Honor has so thoroughly gone into that at Page 12 [fol. 1496] and 13 of your Honor's opinion, that we could not add anything to it.

We think, under the circumstances, and for the exercise of sound discretion, the weight is in favor of the plaintiffs against your Honor exercising the discretion you have to stay your Honor's decision pending an appeal.

Therefore, we are opposed to it.

Mr. Boyd: The statement which Mr. Baldrige makes, your Honor, with respect to the strike, is rather astounding: Your Honor will realize that the strike took place even before the order was signed.

Mr. Murray, the head of the United Steel Workers of America, C. I. O., saw fit to call the workers out on strike even before your Honor had signed the order—before the order was even drawn.

I do not think that Mr. Baldrige is in a position to say that staying the order would cause the strikers to return to their jobs.

Mr. Broun: Bethlehem Steel also opposes the stay requested by the Government.

We think there is very little, if any, difference, in the situation as to whether you should issue a stay or issue a preliminary injunction.

We think that we are entitled to our plants back and we think that the action taken overnight by the United [fol. 1497] Steel Workers of America, C. I. O., has been unwarranted in calling a strike.

There is nothing now that can be served by the granting of a stay, nothing.

Mr. Westwood: I add, only, your Honor this: That the request Mr. Baldrige makes would seem to us, if granted, to imply that there was some basis for a claim of right as asked for the plaintiff, to which your Honor adverted at Page 13 of your opinion and took into account and rejected when you acted on the motion for a preliminary injunction.

I can see no considerable difference between the question now presented to your Honor and the question that was so fully presented on the motion for the preliminary injunction.

Mr. Bane: Jones & Laughlin opposes the motion which your Honor is now giving attention to, largely for the reason stated by Mr. Westwood and the others.

What Mr. Baldrige is asking for now is that you reverse the judgment which has just entered.

The strike which was called last night I think amply answers the question before your Honor.

Mr. Tumulty: Armco and Sheffield also desire to oppose

the application for a stay and, in addition to the reasons advanced by counsel for the other plaintiffs I desire to point out the fact that the Court found irreparable damage, [fol. 1498] found the existence of irreparable damage, and the granting of a stay would cause a continuance and an aggravation of the damage referred to by the Court on Page 13 of its opinion, and I agree with Mr. Bane that it would be, in effect, a reversal of the decision of the Court.

In addition to all of that there is the fact that the defendant has itself remedies in the appellate courts including the right to appeal there for relief in the way of a stay.

It would be entirely inappropriate for this Court to enter any order which would have the effect of perpetuating the course of unconstitutional conduct pursued by the Government.

Mr. Peacock: We endorse what has been said.

The Court: Do you have any rebuttal, Mr. Attorney General?

Mr. Baldrige: No, your Honor. I have stated our position as fully as we ~~can~~ is called for under the circumstances.

The Court: The application for a stay is denied.

You will now be permitted, Mr. Attorney General, to seek relief elsewhere in case you are so advised.

Mr. Baldrige: Yes, sir.

The Court: Is there any further business to come before this Court in this matter?

Mr. Wilson: No, your Honor.

[fol. 1499] Mr. Westwood: And may the record show that I have made a motion to withdraw the verbal amendment which was made to our written motion and that that leave has been granted?

The Court: Yes; leave is granted.

The Court will now stand adjourned until the return of the Court.

(Thereupon the instant hearing was concluded.)

[fol. 1500] Reporter's certificate (omitted in printing).

[fol. 1178] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT, APRIL TERM, 1952

No. 11,404

CHARLES SAWYER, Department of Commerce, Washington,
D. C., Appellant,

v.

UNITED STATES STEEL COMPANY, Appellee

No. 11,405

CHARLES SAWYER, 4000 Cathedral Ave., N. W., Washington,
D. C., Appellant,

vs.

UNITED STATES STEEL COMPANY, Appellee

No. 11,406

CHARLES SAWYER, Individually and as Secretary of Com-
merce of the United States of America, Appellant,

vs.

BETHLEHEM STEEL COMPANY, et al., Appellees

No. 11,407.

CHARLES SAWYER, Secretary of Commerce, Department of
Commerce, Washington, D. C., Appellant,

v.

REPUBLIC STEEL CORPORATION, a New Jersey Corporation,
Appellee

No. 11,408

CHARLES SAWYER, Westchester Apartments, Washington,
D. C., Appellant.

v.

REPUBLIC STEEL CORPORATION, a New Jersey Corporation,
Appellee

[fol. 1179]

No. 11,409

CHARLES SAWYER, Westchester Apartments, Washington,
D. C., Appellant

vs.

JONES & LAUGHLIN STEEL CORPORATION, a Pennsylvania
Corporation, Appellees

No. 11,410

CHARLES SAWYER, The Westchester, 4000 Cathedral Ave.,
N. W., Washington, D. C., Appellant

vs.

THE YOUNGSTOWN SHEET AND TUBE COMPANY, a Body Cor-
porate, Youngstown, Ohio, The Youngstown Metal
Products Company, a Body Corporate, Youngstown,
Ohio, Appellees

No. 11,411

CHARLES SAWYER, Secretary of Commerce, U. S., The West-
chester, 4000 Cathedral Ave., N. W., Washington, D. C.,
Appellant

v.

THE YOUNGSTOWN SHEET AND TUBE COMPANY, a Body Cor-
porate, Youngstown, Ohio, The Youngstown Metal
Products Company, a Body Corporate, Youngstown,
Ohio, Appellees

No. 11,412

CHARLES SAWYER, Individually and as Secretary of Com-
merce of the United States of America, Washington,
D. C., Appellant

vs.

E. J. LAVINO & COMPANY, a Delaware Corporation, Appellee

[fol. 1180]

No. 11,413

CHARLES SAWYER, Individually and as Secretary of Com-
merce of the United States of America, Appellant

vs.

ARMCO STEEL CORPORATION and SHEFFIELD STEEL CORPORA-
TION, Appellees

[File endorsement omitted]

APPLICATION FOR STAY PENDING APPEAL FROM ORDER GRANTING PRELIMINARY INJUNCTION—Filed April 30, 1952

The above-entitled action was instituted following the issuance by the President of the United States of Executive Order 10340 dated April 8, 1952, and the taking possession by the defendant of the plants, facilities and other properties of the plaintiff pursuant thereto to the extent stated in the defendant's Order No. 1 dated April 30, 1952.

The complaint prayed for temporary and final injunctions against continuation of defendant's possession, and also for a preliminary injunction against any action by the defendant which would alter the conditions of employment existing at the time possession was taken.

Upon the submission of extensive affidavits in opposition to the issuance of a preliminary injunction and following oral argument and the filing of briefs, the United States District Court for the District of Columbia on April 30, 1952 entered an order temporarily enjoining further possession or control by defendant of plaintiffs' plants, facilities and other properties.

The defendant filed a notice of appeal from said order on April 30, 1952.

On April 30, 1952 the defendant presented to the said District Court, and it denied, an application for a stay of the said injunctive order pending appeal.

The defendant intends to file within 6 days a petition to the Supreme Court of the United States for a writ of certiorari to review said order.

[fol. 1167] The defendant respectfully moves that the said order granting a preliminary injunction be stayed pending the filing within said period of a petition to the Supreme Court of the United States for a writ of certiorari and until the disposition thereof, and, in the event certiorari is granted, pending the issuance of the mandate of that Court, for the following reasons:

1. It interferes with sovereign functions of the United States.

2. The decision that the Government possession is unlawful was in effect a decision that the employees might lawfully strike, and they have done so, thus jeopardizing and imperiling our national defense and the defense of those joined with this Nation in resisting aggression as found by the President in Executive Order No. 10340, and as established by the uncontested affidavits of Robert A. Lovett, Secretary of Defense; Gordon Dean, Chairman of the United States Atomic Energy Commission; Manley Fleischman, Administrator of the Defense Production Administration; Henry H. Fowler, Administrator of the National Production Authority; Oscar L. Chapman, Secretary of the Interior; Jess Larson, Administrator of General Services; Homer C. King, Acting Administrator of the Defense Transportation Administration; Charles Sawyer, Secretary of Commerce; Harry Weiss, Executive Director of the Wage Stabilization Board; and Nathan P. Feinsinger, Chairman of the Wage Stabilization Board, filed herein.

3. The Government possession under Executive Order No. 10340 had the effect of keeping the steel plants and facilities in operation while collective bargaining between the plaintiff and the United Steel Workers of America, CIO, looking toward possible agreement and return of the plants and facilities continued, and an order staying the order of the District Court seems to be the only possible action which would result in re-establishing that situation immediately. The longer the delay, the more difficult it will become to resume operations.

4. The Court was without power, under the circumstances of this case, to enjoin Presidential action.

[fol. 1168] This application is made upon the entire record and affidavits in this case, all of which is by reference made a part hereof.

Respectfully submitted, (Sgd.) Holmes Baldridge,
Assistant Attorney General.

Of Counsel:

James R. Browning, Edward H. Hickey, Marvin C. Taylor, Samuel D. Slade, Benjamin Forman, Herman Marcuse, T. S. L. Perlman, Attorneys, Department of Justice.

Before Stephens, Chief Judge, and Edgerton, Clark, Wilbur K. Miller, Prettyman, Proctor, Bazelon, Fahy, and Washington, Circuit Judges

ORDER—Filed April 30, 1952

These cases came on to be heard on the original records of the United States District Court for the District of Columbia, and on appellant's applications for stay of the orders of the District Court entered herein on April 30, 1952, and said applications for stay were argued by counsel.

On consideration whereof, and in order fully to preserve the jurisdiction of the Supreme Court and of this Court in these controversies, it is

Ordered by the Court that the orders of the District Court granting the preliminary injunctions in these cases be, and they are hereby, stayed until 4:30 o'clock P. M., Daylight Saving Time, on Friday, May 2, 1952, and, if petitions for writs of certiorari in these cases have then been filed in the Supreme Court, then until the Supreme Court acts upon the petitions for writs of certiorari; and, if the petitions for writs of certiorari be denied, then until the further order of this Court.

Per Curiam.

Dated April 30, 1952.

Chief Judge Stephens and Circuit Judges Clark, Wilbur K. Miller, and Proctor are of the opinion that the Government has made no showing whatever which would justify this Court in staying Judge Pine's orders.

[fol. 1181] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

APPLICATION TO ATTACH CONDITION TO STAY IN ORDER TO PROTECT APPELLEES FROM IRREPARABLE INJURY—Filed May 1, 1952

The appellees pray that this Court attach to its stay of the injunction issued by the District Court herein a con-

dition to the effect that the appellant shall not alter the terms and conditions of employment prevailing between any of the appellees and its employees at the time of the appellant's seizure of the appellees' properties except with the consent of the appellee concerned, or, alternatively, except in accordance with a collective bargaining agreement between such appellee and its employees.

The appellees respectfully request immediate oral argument on this motion.

At the time the motion for preliminary injunction was brought on for argument before the Court below, the appellant was about to change the terms and conditions of employment *by his order*, and appellant's counsel refused to agree even for a limited period of time that no such change would be made. Again appellant's counsel [fol. 1182] made a similar refusal in this Court. The record discloses, therefore, that at any moment the appellant will carry out his pending threat to change the employment conditions. This change will impose increased wages and other employment costs involving millions of dollars which will be paid from the appellees' funds and, even more seriously, will drastically alter each appellee's bargaining position with a powerful union. For this injury the appellees have no remedy except this motion—otherwise they are helpless.

Respectfully submitted, (S.) John J. Wilson, John C. Gall, Attorneys for appellees The Youngstown Sheet and Tube Company and The Youngstown Metal Products Company; (S.) Edmund L. Jones, Howard Boyd, Attorneys for appellee Republic Steel Corporation; (S.) James C. Peacock, Attorney for appellee, E. J. Lavino & Company; (S.) Joseph P. Tumulty, Jr., Attorney for appellee Armco Steel Corporation; (S.) Bruce Bromley, Attorney for appellee Bethlehem Steel Company; [fols. 1183-1195] (S.) John C. Bane, Jr., Attorney for appellee Jones & Laughlin Steel Corporation; (S.) John Lord O'Brian, (S.) Howard C. Westwood, Attorneys for appellee United States Steel Company.

[fol. 1196] Before Stephens, Chief Judge, and Edgerton, Clark, Wilbur K. Miller, Prettyman, Proctor, Bazelon, Fahy, and Washington, Circuit Judges.

ORDER—Filed May 1, 1952

These cases came on for hearing on appellees' application to attach conditions to the stay order of this Court entered herein on April 30, 1952, and said motion was argued by counsel.

On consideration whereof, it is ordered that said application to attach conditions to the stay order be, and it is hereby, denied.

Dated: May 1, 1952.

Per CURTAM:

Chief Judge Stephens and Circuit Judges Clark, Wilbur K. Miller, and Proctor dissent from the foregoing order because they maintain the view, announced by them yesterday, that no stay order should be issued against the decision of the District Court; and because they are further of the view that such stay order having been issued, there should be attached thereto the proviso sought by the appellees, to-wit:

"Provided, however, that, for the duration of this stay, the appellant shall not alter the terms and conditions of employment prevailing between any of the appellees and its employees at the time of the appellant's seizure of the appellees' properties, except with the consent of the appellee concerned, or, alternatively, except in accordance with a collective bargaining agreement between such appellee and its employees; this proviso, however, shall not continue as to any appellee beyond twelve o'clock noon on Saturday, May 3, 1952, unless such appellee files its reply to the appellant's petition for writ of certiorari in the Supreme Court by that time."

[fol. 1197] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

Nos. 11404-13

CHARLES SAWYER, Appellant

v.

UNITED STATES STEEL COMPANY, et al., Appellees.

MEMORANDUM—May 2, 1952

Before Stephens, Chief Judge, and Edgerton, Clark, Wilbur K. Miller, Prettyman, Proctor, Bazelon, Fahy and Washington, Circuit Judges.

[fol. 1198] OPINION—Filed May 2, 1952

EDGERTON, PRETTYMAN, BAZELON, FAHY and WASHINGTON, *Circuit Judges*: The order entered by this court on April 30, 1952, was designed, as it recited, to preserve the jurisdiction of the United States Supreme Court and of this court over the controversies here presented, pending appeal.

The District Court thought that there was "utter and complete lack of authoritative support," for the Government's position, and that the steel companies would suffer irreparable injury by any continuance of Government possession of the mills.

The Supreme Court said as long ago as 1871:

"... Extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized and appropriated to the public use, or may even be destroyed without the consent of the owner. . . . Exigencies of the kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right, and it is

clear that the emergency must be shown to exist before the taking can be justified. Such a justification may be shown, and when shown the rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the government is bound to make full compensation to the owner." *United States v. Russell*, 13 Wall. 627-8 (U. S. 1871).

Only last year the Supreme Court held that "the United States became liable under the Constitution to pay just compensation" for a taking under circumstances closely parallel to those of the present case. *United States v. Pee Wee Coal Co.*, 341 U. S. 114, 117.

[fol. 1199] In the case before us the Chief Executive took possession of the steel plants as President and as Commander-in-Chief. When that action was challenged, his delegated representative—the Secretary of Commerce—submitted to the court, in the form of affidavits of the Secretary of Defense and other officials primarily responsible for the national security, the evidence which they said "fully proved" the emergency.

Under these circumstances, the cases we have cited, and many others, indicate there is at least a serious question as to the correctness of the view of the District Court to which we have referred.

The Supreme Court has said an appellate court is empowered "to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong." *Scripps-Howard Radio v. Comm'n*, 316 U. S. 4 at 9. (Emphasis added.) See also *Virginia R. Co. v. Federation*, 300 U. S. 515, 552.

This case was before the District Court upon a motion for a preliminary injunction. Upon such a motion, the Supreme Court has ruled:

"... Even in suits in which only private interests are involved the award is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction.

[fols. 1200-1201d] "But where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff." *Yakus v. United States*, 321 U. S. 414, 440.

In the affidavits in this record, defense officials are emphatic that continued production of steel is of vital importance to the national security, and submit data in support of that view. On the other hand, the companies may suffer monetary loss. But as to this the Government concedes that any such loss will be compensable under the Constitution, and the Supreme Court cases above cited support that view. Upon these considerations, we think that the preliminary injunction issued by the District Court must be stayed as we have ordered.¹

Chief Judge Stephens and Circuit Judges Clark, Wilbur K. Miller and Proctor dissent from the foregoing opinion.

¹ The pertinent part of our order of April 30, 1952, is:

"Ordered by the Court that the orders of the District Court granting the preliminary injunctions in these cases be, and they are hereby, stayed until 4:30 o'clock P.M., Daylight Saving Time, on Friday, May 2, 1952, and, if petitions for writs of certiorari in these cases have then been filed in the Supreme Court, then until the Supreme Court acts upon the petitions for writs of certiorari; and, if the petitions for writs of certiorari be denied, then until the further order of this Court."

[fol. 1598] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1951

No. 744

THE YOUNGSTOWN SHEET AND TUBE COMPANY, et al.,
Petitioners,

v.

CHARLES SAWYER, Respondent

No. 745

CHARLES SAWYER, Secretary of Commerce, Petitioner,

v.

THE YOUNGSTOWN SHEET AND TUBE COMPANY, et al.,
Respondents

STIPULATION DESIGNATING PARTS OF RECORD TO BE PRINTED

It is hereby stipulated and agreed by and between the parties hereto that the portions of the record to be printed shall be as shown in the attached Enclosure A. It is further stipulated and agreed that reference on brief and on argument may be made to portions of the record not printed.

Sturgis Warner, Of Counsel for Petitioners in No. 744 and for Respondents in No. 745. Philip B. Perlman, Solicitor General, Of Counsel for Respondent in No. 744 and for Petitioner in No. 745.

[fol. 1599] Enclosure A to Stipulation Designating Parts of Record to be Printed

From Record U. S. D. C., District of Columbia in Youngstown Sheet and Tube Company, et al. v. Charles Sawyer, Secretary of Commerce (No. 1635-52, D. D. C.; No. 11,411 D. C. Cir.)

Complaint for injunction and for a declaratory judgment
Executive Order 10340
Motion for preliminary injunction
Memorandum in support of motion

Affidavit of Herman J. Spoerer

Affidavit of Walter E. Watson

Opposition to motion for a preliminary injunction

Executive Order 10340 (omitted, printed *supra*)

Telegram from Charles Sawyer

Order No. 1 of Charles Sawyer

Affidavit of Robert A. Lovett

Affidavit of Gordon Dean

Affidavit of Manly Fleischmann

Affidavit of Henry H. Fowler

Affidavit of Oscar L. Chapman

Affidavit of Jess Larson

Affidavit of Homer C. King

Affidavit of Charles Sawyer

Affidavit of Harry Weiss

(Enclosures omitted)

Affidavit of Nathan P. Feinsinger

Opinion, Pine, J., April 29, 1952.

Preliminary Injunction and Order Fixing Amount of Bond, April 30, 1952.

Notice of Appeal, April 30, 1952.

Application in U. S. District Court for Stay of the order granting preliminary injunction, April 30, 1952.

Order of Pine, J., denying application for stay, April 30, 1952.

Designation of record on appeal, April 30, 1952.

Order to transmit original record, Pine, J., April 30, 1952.

[fol. 1600] From Record in United States Steel Company v. Charles Sawyer (No. 1625-52, D. D. C.; No. 11,404 B. C. Cir.)

Complaint for declaratory judgment and injunctive relief
(Exhibits omitted)

Motion for preliminary injunction

Points and authorities in support of motion

Amendment No. 4 to Complaint

Affidavit of Wilbur L. Lohrentz

Affidavit of Lewis M. Parsons

Affidavit of John A. Stephens

Opposition to motion for a preliminary injunction (omitted in printing)

Motion to withdraw verbal amendment and to proceed on the basis of motion for preliminary injunction—Granted

(Record corresponds in other material respects to record in Youngstown Steel and Tube Co., Case No. 1635-52, D. D. C.)

From Record in United States Steel Company v. Charles Sawyer (No. 1624-52, D. D. C.; No. 11,405, D. C. Cir.)

Notice of Special Appearance

Motion to Dismiss or, in Lieu Thereof, to Quash the Return of Service of Summons

(Record corresponds in other material respects to record in United States Steel Co., Case No. 1625-52, D. D. C.)

From Record in Youngstown Sheet and Tube Company v. Charles Sawyer (No. 1550-52, D. D. C.; No. 11410, D. C. Cir.)

Motion for temporary restraining order

Order of Holtzoff, J.; denying temporary restraining order

Notice of Special Appearance—(Omitted. Corresponds to notice printed in United States Steel Co., Case No. 1624-52, D. D. C., printed *supra*.)

Motion to Dismiss or, in Lieu Thereof, to Quash the Return of Service of Summons—(Omitted. Corresponds to motion printed in United States Steel Co., Case No. 1624-52, D. D. C., printed *supra*.)

(Record corresponds in other material respects to record in Youngstown Sheet and Tube Co., Case No. 1635-52, D. D. C.)

[fol. 1601] From Record in the Armco Steel Corporation, et al. v. Charles Sawyer, individually and as Secretary of Commerce (No. 1700-52, D. D. C.; No. 11,413, D. C. Cir.)

Complaint for declaratory judgment, permanent injunction and other relief.

Motion for Preliminary Injunction.

(Record corresponds in other material respects to record in Youngstown Sheet and Tube Co. case No. 1635-52, D. D. C.)

From Record in Bethlehem Steel Co., et al. v. Charles Sawyer, individually and as Secretary of Commerce (No. 1549-52, D. D. C.; No. 11,406, D. C. Cir.)

Complaint for Declaratory Judgment and Injunctive Relief.

Affidavit of R. E. McMath.

Motion for a Temporary Restraining Order and Order to Show Cause.

Order of Holtzoff, J., denying Temporary Restraining Order (omitted, printed *supra*).

Motion for Preliminary Injunction.

Affidavit of Bruce Bromley in Support of Motion for Preliminary Injunction.

(Record corresponds in other material respects to record in Youngstown Sheet and Tube Co. case No. 1635-52, D. D. C.)

From Record in Jones & Laughlin Steel Corporation v. Charles Sawyer (No. 1581-52, D. D. C.; No. 11,409, D. C. Cir.)

Complaint.

Motion for temporary restraining order and preliminary injunction.

Affidavit of William R. Elliot.

(Record corresponds in other material respects to record in Youngstown Sheet and Tube Co. case No. 1635-52, D. D. C. Omitted in printing.)

From Record in Republic Steel Corporation v. Charles Sawyer, Secretary of Commerce (No. 1647-52, D. D. C.; No. 11,407, D. C. Cir.)

Complaint.

Affidavit of Eugene Magee.

Affidavit of John M. Schlendorf.

Motion for Preliminary Injunction.

[fol. 1602] (Record corresponds in other material respects to record in Youngstown Sheet and Tube Co. case No. 1635-52, D. D. C.; Omitted in printing.)

From Record in Republic Steel Corporation v. Charles Sawyer (No. 1539-52, D. D. C.; No. 11,408, D. C. Cir.)

Motion for temporary restraining order.

Order of Holtzoff, J., denying temporary restraining order (omitted, printed *supra*).

Notice of Special Appearance (Omitted. Corresponds to notice printed in United States Steel Co. case, No. 1624-52, D. D. C., printed *supra*.)

Motion to Dismiss or, in Lieu Thereof, to Quash the Return of Service of Summons (Omitted. Corresponds to motion printed in United States Steel Co. case, No. 1624-52, D. D. C., printed *supra*).

(Record corresponds in other material respects to record in Republic Steel Corporation case No. 1647-52, D. D. C.)

From Record in E. J. Lavino & Company v. Charles Sawyer, individually and as Secretary of Commerce (No. 1732-52, D. D. C.; No. 11,412, D. C. Cir.)

Complaint.

Exhibits A, B, D—omitted in printing.

Exhibit C—Notice of Taking Possession.

Exhibit E—Letter from E. J. Lavino & Co. to Charles Sawyer dated April 10, 1952.

Exhibit F—Telegram from Charles Sawyer to E. J. Lavino & Co. dated April 12, 1952.

Exhibit G—Telegram from E. M. Lavino to Charles Sawyer dated April 14, 1952.

Motion for preliminary injunction.

Statement of points and authorities in support of motion for preliminary injunction.

Affidavit of Andrew Leith.

Affidavit of Charles Sawyer.

Affidavit of George B. Gold (with Exhibit A thereto).

Exhibit A—Sheridan, Pa. Plant—Payroll ending 4/13/52.

(Record corresponds in other material respects to record in Youngstown Sheet and Tube Co. case No. 1635-52, D. D. C. Omitted in printing.)

[fol. 1603] Transcript of proceedings before Holtzoff, J., April 9, 1952.

Transcript of proceedings before Bastian, J., April 10, 1952.

Transcript of proceedings before Pine, J., April 10, 1952.

Transcript of proceedings before Pine, J., April 24-25, 1952.

Transcript of proceedings before Pine, J., April 30, 1952.

From record in Court of Appeals (Case Nos. 11,404-11,413)..

Application for Stay pending appeal from order granting preliminary injunction, Case No. 11,411 (Applications in cases Nos. 11,404-11,410 and 11,412-11,413 are identical and are omitted in printing).

Order dated April 30, 1952 staying orders of the United States District Court for the District of Columbia.

Application of Appellees to Attach Condition to Stay in Order to Protect Appellees from Irreparable Injury.

Order dated May 1, 1952 denying application of appellees to attach condition to stay.

Opinion of the Court dated May 2, 1952.

This Stipulation.

[fol. 1604] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1951

No. 744

YOUNGSTOWN SHEET AND TUBE COMPANY ET AL., Petitioners,
vs.

CHARLES SAWYER

ORDER ALLOWING CERTIORARI—Filed May 3, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is assigned for argument on Monday, May 12th next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Burton, with whom Mr. Justice Frankfurter concurred, voted to deny certiorari, and filed a memorandum expressing their reasons therefor.

[fol. 1605] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1951

No. 745

CHARLES S. SAWYER, Secretary of Commerce, Petitioner,
vs.

YOUNGSTOWN SHEET AND TUBE COMPANY ET AL.

ORDER ALLOWING CERTIORARI—Filed May 3, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is assigned for argument on Monday, May 12th next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Burton, with whom Mr. Justice Frankfurter concurred, voted to deny certiorari, and filed a memorandum expressing their reasons therefor.

[fol. 1606] SUPREME COURT OF THE UNITED STATES

JOURNAL OF SATURDAY, MAY 3, 1952

Present: Mr. Chief Justice Vinson, Mr. Justice Black, Mr. Justice Reed, Mr. Justice Frankfurter, Mr. Justice Douglas, Mr. Justice Jackson, Mr. Justice Burton, Mr. Justice Clark, and Mr. Justice Minton.

No. 744. The Youngstown Sheet and Tube Company et al., petitioners, v. Charles Sawyer; and

No. 745. Charles Sawyer, Secretary of Commerce, petitioner, v. The Youngstown Sheet and Tube Company et al. On petitions for writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit. *Per Curiam*: Certiorari granted. Mr. Justice Burton, with whom Mr. Justice Frankfurter concurred, voted to deny certiorari, and filed a memorandum expressing their reasons therefor. The cases are assigned for argument on Monday, May 12, next.

The order of the District Court entered April 30, 1952, is hereby stayed pending disposition of these cases by this Court. It is further ordered, as a provision of this stay, that Charles S. Sawyer, Secretary of Commerce (respondent in No. 744 and petitioner in No. 745) take no action to change any term or condition of employment while this stay is in effect unless such change is mutually agreed upon by the steel companies (petitioners in No. 744 and respondents in No. 745) and the bargaining representatives of the employees.

Memorandum by Mr. Justice Burton with whom Mr. Justice Frankfurter concurred:

The first question before this Court is that presented by the petitions for a writ of certiorari bypassing the Court of Appeals. The constitutional issue which is the subject of the appeal deserves for its solution all of the wisdom that our judicial process makes available. The need for soundness in the result outweighs the need for speed in reaching it. The Nation is entitled to the substantial value inherent in an intermediate consideration of the issue by the Court of Appeals. Little time will be lost and none will be wasted in seeking it. The time taken will be available also for constructive consideration by the parties of their own positions and responsibilities. Accordingly, I would deny the petitions for certiorari and thus allow the case to be heard by the Court of Appeals. Such action would eliminate the consideration here of the terms of the stay of the order of the District Court heretofore issued [fol. 1607] by the Court of Appeals. However, certiorari being granted here, I join in all particulars in the order of this Court, now issued, staying that of the District Court.

Adjourned until Monday, May 5, next, at 12 o'clock.

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CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1951

No. 744

THE YOUNGSTOWN SHEET AND TUBE COMPANY, ET AL.,
REPUBLIC STEEL CORPORATION, ARMCO STEEL CORPORATION
and SHEFFIELD STEEL CORPORATION, BETHLEHEM
STEEL COMPANY, ET AL., JONES & LAUGHLIN STEEL CORPORATION,
UNITED STATES STEEL COMPANY, and E. J.
LAVINO & COMPANY, *Petitioners,*

v.

CHARLES SAWYER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT

IN THE
Supreme Court of the United States

OCTOBER TERM, 1951

No. 744

THE YOUNGSTOWN SHEET AND TUBE COMPANY, ET AL.,
REPUBLIC STEEL CORPORATION, ARMCO STEEL CORPORATION
and SHEFFIELD STEEL CORPORATION, BETHLEHEM
STEEL COMPANY, ET AL., JONES & LAUGHLIN STEEL CORPORATION,
UNITED STATES STEEL COMPANY, and E. J.
LAVINO & COMPANY, *Petitioners*,

v.

CHARLES SAWYER, *Respondent*.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT**

Petitioners pray that a writ or writs of certiorari issue to review the judgment of the United States District Court for the District of Columbia entered in the above-entitled cause on April 30, 1952.* The opinion of that Court (R.

*Separate actions were brought below by each of the petitioners; and in each a motion was made for a preliminary injunction. These motions were all heard and decided together.

66), announced on April 29, 1952, has not yet been reported. A copy is attached as an appendix to this petition. The United States Court of Appeals for the District of Columbia Circuit has not rendered any opinion on the judgment which is here sought to be reviewed.

JURISDICTION

The judgment of the District Court granting preliminary injunctions in favor of the petitioners was entered on April 30, 1952. (R. 76) The respondent docketed an appeal in the Court of Appeals on April 30, 1952. (R. 442) The Court of Appeals has not acted on that appeal. Jurisdiction of this Court is invoked under Title 28 of the United States Code, §1254(1), providing for the granting of a writ of certiorari upon the petition of any party before rendition of judgment by the Court of Appeals.

QUESTIONS PRESENTED

The questions presented, which were correctly resolved by the District Court, are:

(1) Whether the respondent Sawyer had any lawful right to seize the properties of the petitioners on April 8, 1952, to retain possession of those properties and, as an incident of that possession, to impose on petitioners, by executive fiat, new wage scales and terms of employment.

(2) Whether the Executive has "inherent power" under the Constitution to authorize seizure of private property on the claim of a "national emergency" when Congress has provided a different remedy—specifically excluding seizure—for just such a "national emergency."

(3) Whether petitioners, faced with irreparable injury and lacking any adequate remedy at law, are entitled to equitable relief in the form of the preliminary injunctions issued by the District Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions which are relevant to decision of this case are Articles I and II and Amendments IV, V, IX and X of the United States Constitution, Sections 206 through 210 of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C.A. §§176-180, Sections 1346(b) and 2680(a) of Title 28, United States Code, and Titles II and V of the Defense Production Act, as amended, 64 Stat. 798, 65 Stat. 132, 50 U.S.C.A. App. §§2081, 2121-2123. Since it is not the purpose or function of this petition to serve as a brief on the merits, those provisions are not set out herein.

STATEMENT

This petition seeks to review the judgment of the District Court which issued preliminary injunctions in favor of the petitioners restraining respondent from continuing the seizure and possession of the properties of the petitioners, which he had seized on April 8, 1952, and from acting under the purported authority of Executive Order No. 10340.

Executive Order No. 10340 (R. 6), issued by the President of the United States on April 8, 1952, directed the respondent to take possession of such plants of companies named in a list attached thereto, including petitioners, as he deemed necessary in the interest of national defense, to operate them or arrange for their operation and to prescribe the terms and conditions of employment under which they should be operated. By virtue of that Executive Order, respondent issued his Order No. 1 (R. 22), also dated April 8, 1952, in which he stated that he deemed it necessary in the interest of national defense to take possession of the plants of the companies named in a list attached to his order, including plants of petitioners, and that therefore he had taken possession of those plants, effective April 8, 1952. By the same order, he designated the president of each seized company as operating manager for the

United States until further notice, and directed him to operate the plants subject to the supervision of respondent.

The true nature of respondent's action enjoined by the District Court appears clearly when the background of the dispute which led to the respondent's seizure of the petitioners' properties on April 8, 1952, is reviewed. The petitioners' several contracts with the United Steelworkers of America, representing certain of the petitioners' employees, expired on December 31, 1951.* Negotiations between the Union and the petitioners looking to new contracts had been under way for five weeks prior thereto. On December 22, 1951, when it appeared that the parties had not made substantial progress toward the settlement of the disputed issues, the President submitted to the Wage Stabilization Board the questions at issue between the petitioners and other steel companies and the Union. That Board, following review of the report of an *ad hoc* panel appointed to inquire into the dispute, issued certain recommendations on March 22, 1952. These recommendations met in large measure most of the demands of the Union and were accepted by the Union. They were not acceptable to the steel companies, including these petitioners. On April 3, 1952, the Union called a nationwide steel strike to be effective at 12:01 A.M., April 9. On the evening of April 8 the President issued the Executive Order aforesaid, and the strike call was immediately cancelled.

At no time throughout this controversy did the President take any action under Sections 206-210 of the Labor Management Relations Act of 1947 which provide measures for dealing with industry-wide strikes which threaten the national health and safety, or under any other statute.

Following the seizure of their properties by respondent, petitioners brought actions for declaratory judgments and

*The contract of petitioner E. J. Lavino & Company with the Union expired on a different date and there are other factual differences between that company and the other petitioners. See footnote, p. 5.

injunctive relief on the ground that the seizure of their properties was without authority of law and constituted an illegal invasion of their rights. At the same time, threatened by respondent's repeated announcements of his intention to make changes in terms and conditions of employment to the irreparable damage of petitioners, as fully set forth in the affidavits filed in the District Court (R. 14, 16, 96, 99, 123, 130, 140, 159, 163, 192), petitioners sought preliminary injunctions to restrain the respondent from taking any action to impair their possession, control and management of any of their properties. The questions involved were thoroughly argued and briefed in a hearing before the District Court over a period of two days, following which that Court issued its opinion holding that the action of respondent in seizing the properties of petitioners was completely without authority of law, that Congress has provided a remedy (not followed in this case) to meet just such an emergency as was here claimed, that irreparable injury would result to petitioners if preliminary injunctions were not issued, and that petitioners did not have any adequate remedy at law. The court entered judgment issuing the preliminary injunctions prayed for.* Respondent docketed his appeal on April 30, 1952. This petition is sought in advance of the rendition of any judgment on that appeal by the Court of Appeals. By the

*In the case of petitioner E. J. Lavino & Company, further grounds for the relief sought in the District Court were pleaded in its complaint and established in the affidavits of its vice presidents, Andrew Leith and George B. Gold. For example, it is not engaged in the manufacture or fabrication of steel; its labor classifications and their content are substantially different from those of the steel industry; it was not a party to the controversy before the Wage Stabilization Board; and so forth (R. 193, 201). Because, however, of the all-inclusive grounds upon which the decision and judgment of the District Court were based, that Court did not have occasion to consider those further grounds in detail, but it did refer to them in its opinion (R. 67). For the reasons set forth herein, petitioner Lavino joins in this petition but reserves its right to develop further those grounds, either in connection with any stay or in argument on the merits.

narrow division of five judges to four the Court of Appeals has granted a stay of the judgment of the District Court. See *infra*, pages 9-10.

SPECIFICATION OF ERRORS TO BE URGED

The decision of the District Court, on thorough consideration, dealt fully and correctly with all issues involved. Petitioners urge that the District Court correctly stated the law in all respects and in no way erred.

REASONS FOR GRANTING THE WRIT

1. We understand that respondent's counsel expect shortly to present a petition for certiorari to review the judgment here involved. Of the nature and scope of that petition we are not presently advised. Petitioners nevertheless, both in their own interests and in the interests of the Nation, feel it incumbent upon them to submit this petition on their own behalf, to the end that the vital questions here presented should be resolved at the earliest possible moment by this Court.

2. Although the District Court necessarily and correctly decided the fundamental constitutional questions involved in this proceeding, the issues are of such vital importance to the Nation that the public interest requires that this Court authoritatively confirm the judgment of the District Court. The present situation is seriously confused—to the detriment of all parties to the dispute and, above all, in conflict with the basic welfare and interests of the Nation. Despite the invalidation by the District Court of respondent's seizure of petitioners' properties, respondent remains in unlawful possession of those properties. His interference with petitioners is unabated. There remains his announced intention to supplant petitioners at the collective bargaining table and to impose, unilaterally, changes in the terms and conditions of employment of petitioners.

employees. Such action would irreparably and permanently impair the bargaining position of petitioners in the further negotiations with the Union which must take place before a final settlement of the underlying dispute can be reached. If respondent puts into effect the recommendations of the Wage Stabilization Board, this would impose on petitioners for an indefinite period changes in employee-employer relationships and increased employment costs of several hundreds of millions of dollars annually to their irreparable damage. This dangerous and irreparable interference—the effects of which can never be undone—can only be resolved by decision of this Court of the vital constitutional questions here presented.

3. It is inescapable that the public interest requires the prompt settlement by this Court of the grave constitutional questions involved in this case. It is for this reason primarily that petitioners seek review by this Court of the judgment below in their favor, before rendition of judgment by the Court of Appeals. The identical procedure followed in *United States v. United Mine Workers*, 329 U. S. 708, 709, 710 (1946), 330 U. S. 258 (1947), in which certiorari was granted at the petition of the successful party below prior to judgment of the Court of Appeals, is equally appropriate in this case. See also *Norman v. Baltimore & Ohio R. Co.*, 294 U. S. 240, 243, 294, 295 (1935); *Ex parte Quirin*, 317 U. S. 1, 19, 20 (1942); *H. P. Hood & Sons v. United States*, 307 U. S. 588 (1939); *Railroad Retirement Board v. Alton Railroad Co.*, 295 U. S. 330 (1935). While the petition in this case is addressed to a judgment granting injunctions, preliminary in form, the matter nevertheless is ripe for and requires final determination. The case was fully briefed and argued in the District Court. In view of the irreparable injury to which petitioners were exposed, the District Court considered the fundamental issues presented by the controversy in great detail and finally disposed of them. The empty formality of proceeding to a final hearing could have no effect on the basic posture of the

constitutional questions presented and would decidedly not serve the public interest.

IMMEDIATE HEARING

An early determination of the ultimate questions presented by this case is of vital importance to all concerned. The urgency of the matter caused respondent on the afternoon of April 30, 1952, to accede to the inclusion in the stay issued by the Court of Appeals of a provision that he file a petition for a writ of certiorari in this Court by 4:30 P.M. on May 2, 1952. A similar recognition of the critical and urgent importance of the issues has caused petitioners to file this petition at the earliest possible moment following the conclusion of the proceedings in the Court of Appeals. To the same end, petitioners hereby waive their rights under the rules of this Court for time to file a reply to respondent's expected petition and undertake to file their response, if any, by 12:00 Noon on May 3, 1952. Also, petitioners are prepared to file briefs on the merits promptly following any grant of certiorari. (The case has already been extensively briefed in the District Court.)

PRESERVATION OF THE STATUS QUO

Throughout this proceeding petitioners have sought the aid of the courts to prevent respondent from taking irrevocable action which would inflict on them irreparable damage. When respondent announced his intention promptly to put into effect changes in the terms and conditions of employment, petitioners brought on for hearing their motions for preliminary injunction. On the basis of the substantially undisputed proof submitted by the parties, the District Court found as a fact that the continuation of the seizure of petitioners' properties was subjecting and would subject petitioners to immediate and irreparable damage.

Thereupon the District Court entered an order enjoining respondent from continuing the seizure of petitioners' properties and from acting under the purported authority of Ex-

Executive Order 10340. Respondent immediately sought a stay of this order from the District Judge. This was denied. Thereafter, respondent docketed his appeal in the Court of Appeals for the District of Columbia Circuit. On the same day respondent sought a stay of broad scope from the Court of Appeals, announcing his intention immediately to seek review of the District Court's judgment in this Court.

The Court of Appeals refused to grant a stay on the terms sought and of the scope requested. The Court of Appeals recognized that the application sought only to deal with the situation pending a determination by this Court of whether or not to grant certiorari. The Court of Appeals, recognizing the urgency of the issues, granted a stay of the District Court's injunction upon condition that respondent file a petition for a writ of certiorari in this Court by 4:30 P.M. on Friday, May 2, 1952.

The stay granted by the Court of Appeals further provides that it will remain in effect until this Court can act on respondent's petition. Should respondent's petition be granted, the stay will cease. Should the petition be denied, the stay is to continue in effect in order to protect the jurisdiction of the Court of Appeals pending its further order. Thus, the stay is specifically designed to protect the jurisdiction of the appellate court pending review of the District Court's decision.

Immediately following the issuance of the stay by the Court of Appeals, petitioners applied to that Court to preserve the *status quo* by attaching a condition to the stay. Specifically, petitioners asked that if respondent were permitted under the stay (and contrary to the injunction of the District Court) to remain in possession of the seized properties, he should not be allowed to cause irreparable injury to petitioners by unilaterally imposing changes in the terms and conditions of employment pending a decision by this Court. An immediate hearing before the Court *en banc* was granted on this application. The application was denied by a five to four vote on May 1, 1952.

At this hearing the Solicitor General assured the Court that respondent would take no action to change the terms and conditions of employment until such time as he had filed a petition for certiorari in the Supreme Court. But the Solicitor General made it very clear that this voluntary restraint would continue only until respondent had filed a petition for certiorari.

The explicit undertaking of respondent's counsel given to the Court of Appeals not to alter the terms and conditions of employment terminates on his filing a petition for certiorari in this Court, while the stay issued by the Court of Appeals will continue until this Court acts upon respondent's petition. Unless the Court acts upon the respondent's petition forthwith, the steel companies are exposed to irreparable injury should respondent carry out his announced intention and put into effect changed terms and conditions of employment.

There will be, in the first place, the immediate monetary damage involved in the use of the petitioners' funds to pay increased wages and other benefits. A final decision in this case that the respondent's actions are illegal will leave the petitioners no remedy against the United States.* The right to just compensation in the Court of Claims for a "taking" by the United States would be unavailable, for an *illegal* taking is not a taking by the United States. *Hooe v. United States*, 218 U. S. 322, 335-336 (1910); *United States v. North*

*Respondent's counsel argued below that, if the seizure were unlawful, petitioners would have a remedy by action under the Federal Tort Claims Act; Title 28, United States Code, §§1346(b), 2671 et seq. Any such contention is plainly unwarranted. In the first place, the Federal Tort Claims Act applies only to suits based on the negligent or wrongful act of a Government employee "while acting within the scope of his office or employment." Moreover, the Act specifically provides that it is not applicable to "any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid . . ." Cf. *Old King Coal Co. v. United States*, 88 F. Supp. 124 (S.D. Iowa 1949); *Jones v. United States*, 89 F. Supp. 980 (S.D. Iowa 1949).

American Transportation & Trading Company, 253 U. S. 330 (1920); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 695 (1949). This proposition of law was conceded by respondent in the District Court where, after respondent's counsel had argued that there would be a remedy for damages in the Court of Claims, the following colloquy occurred between his counsel and the Court:

"The Court: Does not that presuppose the legality of the taking?"

"Mr. Baldridge: That is correct, your Honor."
(R. 380)*

Needless to say, the respondent individually could not make reparation to the petitioners. His liability would be for hundreds of millions of dollars which he would never be able to pay.

Moreover, if respondent is allowed to change the terms and conditions of employment as he threatens, severe and irremediable damages not susceptible of monetary measurement will be inflicted upon petitioners. They will be deprived in practical effect of their right to the collective bargaining processes, assured them by statute. The relative bargaining position of petitioners and the Union will be fundamentally changed to the permanent prejudice of petitioners. By any definition, such injury is irreparable. *American Federation of Labor v. Watson*, 327 U. S. 582, 593-595 (1946).

The only means for the protection of the petitioners from such injury is immediate action by this Court to preserve the *status quo*. By such action this Court will also protect its jurisdiction to deal with *all* the issues presented in this case.

*The case of *United States v. Pewee Coal Co., Inc.*, 341 U. S. 114 (1951) is not to the contrary. In that case, as specifically pointed out in the Court of Claims (88 F. Supp. 426, 430 (1950)), the legality of the taking was neither raised nor considered. Moreover, the taking there involved, although originally made under executive order, was in effect ratified very shortly thereafter by the passage of the War Labor Disputes Act.

Respondent will undoubtedly renew in his petition for certiorari his prayer for a stay of the judgment of the District Court during the pendency of the case before this Court. Petitioners oppose the grant of any such stay. But if any such stay is issued, it should include a provision preventing the respondent from imposing changes in the terms and conditions of employment prevailing in the petitioners' plants at the time of the seizure, pending final disposition of the case. A similar condition was favored by the 4-judge minority of the Court of Appeals.

It is respectfully requested that such a condition be forthwith required if the stay of the District Court's injunction is to remain in effect.

CONCLUSION

For the foregoing reasons, it is respectfully submitted:

1. This petition for a writ of certiorari should be granted.
2. This case should be set down for argument at the earliest practicable time, if possible during the latter part of the week of May 5.
3. An order should be issued which will preserve the *status quo* and protect petitioners from irreparable injury pending final decision by this Court.

Respectfully submitted,

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APPENDIX.

The Opinion of the District Court referred to in the text appears at page 66 of the printed record.

L. L. CASEY
SUPREME COURT, U. S.

Office - Supreme Court, U. S.
FILED

MAY 10 1952.

CHARLES ELMORE CROSBY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 744.

THE YOUNGSTOWN SHEET AND TUBE COMPANY, *et al.*, REPUBLIC STEEL CORPORATION, ARMCO STEEL CORPORATION, *et al.*, BETHLEHEM STEEL COMPANY, *et al.*, JONES & LAUGHLIN STEEL CORPORATION, UNITED STATES STEEL COMPANY, and E. J. LAVINO & COMPANY,

Petitioners,

—v.—

CHARLES SAWYER,

Respondent.

No. 745.

CHARLES SAWYER,

Petitioner,

—v.—

THE YOUNGSTOWN SHEET AND TUBE COMPANY, *et al.*,

Respondents.

**BRIEF FOR PLAINTIFF COMPANIES, PETITIONERS
IN NO. 744 AND RESPONDENTS IN NO. 745.**

TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions	3
Status of the Parties	3
Statement of Facts	4
A. Events Before the Seizure	4
B. Events After the Seizure	10
Summary of Argument	15
What This Case Does <i>Not</i> Involve	16
ARGUMENT:	
POINT I —	
Mr. Sawyer's invasion of plaintiffs' rights is an arbitrary action inconsistent with, and directly contrary to, the remedy expressly provided by Congress	18.
A. Congress has provided for this precise case a remedy which has not been followed	19
B. There Was and Could Be No Valid Reason For Disregarding the Remedy Provided by Congress and Adopting Instead an Entirely Inconsistent and Unlawful Procedure	24

POINT II —

The seizure of plaintiffs' properties and Mr. Sawyer's other action, including that threatened with respect to wages and other conditions of employment, are unlawful and unconstitutional .. 27

A. The Necessary Background—the Successful Struggle Against the Crown Prerogative and its Culmination in the Constitution of the United States 30

B. The Constitution Provides No Authority for the Seizure or for Mr. Sawyer's Other Actions 37

C. This Seizure, Far from Being Authorized Under the Executive Responsibility to Execute the Laws, is in Conflict With the Laws as Enacted by Congress 43

D. The Seizure and Mr. Sawyer's Other Actions Cannot Be Justified Under the President's Power as Commander in Chief 52

E. The Seizure Cannot be Justified by Any Claim of an "Aggregate of Powers" or by Isolated Instances of Past Executive Action Which Were Never Legally Challenged 62

F. Mr. Sawyer's Action Violates the Fifth Amendment to the Constitution 67

G. Denial of the Sweeping Executive Power Here Claimed Will Not Leave the Government Powerless to Meet an Emergency 69

POINT III —

The seizure and Mr. Sawyer's threatened action are causing and will cause the plaintiffs irreparable injury for which they have no adequate remedy at law 74

A. The seizure is causing serious injury to the plaintiffs and further grave injury is immediately threatened 74

B. Money damages—assuming they could be recovered—would be wholly inadequate 78

C. In any event no money damages are recoverable 80

POINT IV —

The preliminary injunctions were providently issued by the District Court 86

POINT V —

This is not a suit against the President; and the District Court had jurisdiction to grant the requested injunctions 90

CONCLUSION 97

APPENDIX A:

Relevant Provisions of the Constitution 1a

Applicable Provisions of The Labor Management Relations Act of 1947, 61 Stat. 136 *et seq.*, 29 U. S. C. Supp. IV, §§158(a)(5), 158(b)(3), 158(d), 176-180 4a

The Defense Production Act, as Amended, 64 Stat. 798, 65 Stat. 132, 50 U. S. C. A., Appendix, §§2081, 2121-23	8a
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The Universal Military Training and Service Act, 62 Stat. 625 <i>et seq.</i> , 50 U. S. C. A., Appendix, Section 468	12a
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American Federation of Labor v. Watson, 327 U. S. 582 (1946)	76, 78, 79
American National Insurance Co. v. National Labor Relations Board, 187 F. 2d 307 (5th Cir. 1951), <i>cert. granted</i> , 342 U. S. 809 (1951)	77
Ashwander v. Tennessee Valley Authority, 297 U. S. 288 (1936)	79
Bank of Columbia v. Okely, 4 Wheat. 234 (1819)	31 fn.
Bell v. Hood, 327 U. S. 678 (1946)	78
Benson Hotel Corp. v. Woods, 168 F. 2d 694 (8th Cir. 1948)	89
Boyce v. United States, 93 F. Supp. 866 (S. D. Iowa 1950)	81
Bragg v. Weaver, 251 U. S. 57 (1919)	58
Britton v. Butler, 4 Fed. Cas. 177 (C. C. S. D. N. Y. 1872)	58 fn.
Brown v. United States, 8 Cranch 110 (1814)	58
Buscaglia v. District Court of San Juan, 145 F. 2d 274 (1st Cir. 1944), <i>cert. denied</i> , 323 U. S. 793 (1945)	87, 89

Case of Proclamations, 12 Coke's Reports 74, 77 English Reprint 1352	33 ✓
Case of Prohibitions, 12 Coke's Reports 63, 77 English Reprint 1342	33
Case of the Seven Bishops, 12 Howell's State Trials 183	35
Case of Ship Money (The King v. John Hampden), 3 Howell's State Trials 826 (1637)	33, 34 fn., 35
Catlin v. United States, 324 U. S. 229 (1945)	68, 85
Chappell v. United States, 160 U. S. 499 (1896)	58
Chicago & N. W. Ry. Co. v. Dey, 35 Fed. 866 (C. C. S. D. Iowa 1888)	97 fn.
City of Louisville v. Louisville Home Telephone Co., 279 Fed. 949 (6th Cir. 1922)	88
Coates v. United States, 181 F. 2d 816 (8th Cir. 1950)	80
Coty v. Prestonettes, Inc., 285 Fed. 501 (2d Cir. 1922)	88
Dean Milk Co. v. Madison, 340 U. S. 349 (1951)	69
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Estate of Sanford v. Comm'r, 308 U. S. 39 (1939)	81 fn.
Ex parte Milligan, 4 Wall. 2 (1866)	40, 54, 56, 71
Ex parte Quirin, 317 U. S. 1 (1942)	40, 53, 57 fn., 71
Finn v. United States, 123 U. S. 227 (1887)	81 fn.
Fleming v. Moberly Milk Products Co., 160 F. 2d 259 (D. C. Cir. 1947), <i>cert. dismissed</i> , 331 U. S. 786 (1947)	94
Fleming v. Page, 9 How. 603 (1850)	54
Foster Packing Co. v. Haydel, 278 U. S. 1 (1928)	89
Fraser v. Geist, 1 F. R. D. 267 (E. D. Pa. 1940)	79

Garber v. United States, 46 Ct. Cls. 503 (1911)	83
Gibbs v. Buck, 307 U. S. 66 (1939)	89
Gilchrist v. Collector of Charleston, 10 Fed. Cas. 355 (C. C. D. S. C. 1808)	45, 46, 95
Graves v. N. Y. ex rel. O'Keefe, 306 U. S. 466 (1939) ..	70
Hebert v. Louisiana Co., 272 U. S. 312 (1926)	68
Hirabayashi v. United States, 320 U. S. 81 (1943)	48, 71
Holzendorf v. Hay, 20 App. D. C. 576 (1902)	92
Home Bldg. & L. Assn. v. Blaisdell, 290 U. S. 398 (1934)	70
Hooe v. United States, 218 U. S. 322 (1910)	57, 81, 82
House v. Mayes, 219 U. S. 270 (1911)	40
Humphrey's Executor v. United States, 295 U. S. 602 (1935)	39 fn.
Hurley v. Kincaid, 285 U. S. 95 (1932)	83, 84
Hynes v. Grimes Packing Co., 337 U. S. 86 (1949)	92
Ickes v. Fox, 300 U. S. 82 (1937)	91
International News Service v. Associated Press, 248 U. S. 215 (1918)	78
Isbrandtsen-Moller Co. v. United States, 300 U. S. 139 (1937)	48
Jackson Co. v. Gardiner Inv. Co., 200 Fed. 113 (1st Cir. 1912)	88
Jones v. United States, 89 F. Supp. 980 (S. D. Iowa 1949)	81
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Kendall v. United States, 12 Pet. 522 (1838)	92, 93
Kessler v. Eldred, 206 U. S. 285 (1907)	79

Kilbourn v. Thompson, 103 U. S. 168 (1881)	37 fn.
Kimball Laundry Co. v. United States, 338 U. S. 1 (1949)	84
Kohl v. United States, 91 U. S. 367 (1875)	82
Land v. Dollar, 330 U. S. 731 (1947)	78, 91
Langford v. United States, 101 U. S. 341 (1879)	82
Larson v. Domestic and Foreign Commerce Corp., 337 U. S. 682 (1949)	82, 83, 96
Lauterbach v. United States, 95 F. Supp. 479 (W. D. Wash. 1951)	81
Lichter v. United States, 324 U. S. 742 (1948)	40, 53
Little v. Barreme, 2 Cranch 170 (1804)	44, 45, 46, 95
Lord Mfg. Co. v. Stimson, 73 F. Supp. 984 (D. D. C. 1947)	92
Luckenbach S.S. Co. v. Norton, 21 F. Supp. 707 (E. D. Pa. 1937)	79
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Madsen v. Kinsella, No. 411, October Term, 1951, decided April 28, 1952	54
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Meccano, Ltd. v. John Wanamaker, 253 U. S. 136 (1920)	88
Mississippi v. Johnson, 4 Wall. 475 (1866)	96, 97
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United States v. Threlkeld, 72 F. 2d 464 (10th Cir. 1934), <i>cert. denied</i> , 293 U. S. 620 (1934)	58 fn.
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	PAGE
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98 Cong. Rec. 4067 (April 16, 1952), 4159 (April 18, 1952), 4193, 4197 (April 21, 1952), 4287 (April 22, 1952)	48 fn.
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Section 201	3, 47 fn., 49
Section 201(a)	50
Section 201(b)	50
Section 501	51
Section 502	51
Section 503	51

Department of Commerce Order 140	74 fn.
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Emancipation Proclamation (12 Stat. 1267, 1268)	65
Emergency Powers Interim Continuation Act (enacted April 14, 1952)	47
English Bill of Rights (1 Will. & Mary Sess. 2, c. 2 (1688))	36
Executive Order:	
9934	26 fn.
9934a	26 fn.
9939 and 9970	26 fn.
9959	26 fn.
9964	26 fn.
9987	26 fn.
10106	26 fn.
10340	8, 9, 26, 27, 39, 48, 59, 75
Federal Tort Claims Act, 62 Stat. 982, as amended, 28 U. S. C. §2680-a	80
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Fortescue, De Laudibus Lebum Angliæ	32
H. R. Doc. No. 1, 82nd Cong. 1st Sess. (1951)	59
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Section 101	3
Section 202	19
Section 206	3, 19

	PAGE
Section 207	3, 19
Section 208	3, 19
Section 209	3, 20, 25
Section 210	3, 20
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Chapter 39	31
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Section 8(b)(3), added by the 1947 amendment	22
Section 8(d)	22
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Universal Military Training and Service Act, 62 Stat. 625; 50 U. S. C. A. App. §468:	
Section 18	3, 47 fn., 49
28 U. S. C. §1254(1)	2
28 U. S. C. §1346-b	80 fn.
28 U. S. C. §2680-a	80 fn.
U. S. Constitution:	
Article I	3
Section 1	37
Section 8	37, 40, 53
Article II	3, 38, 39
Amendment IV	3
Amendment V	3, 31 fn., 67
Amendment IX	3, 40
Amendment X	3, 40
War Labor Disputes Act of 1943, c. 144, §§3-6, 57 Stat. 164-166 (June 25, 1943)	46, 47 fn., 57 fn.
Weimar Constitution in Germany, Article 48	69 fn.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1951

No. 744.

THE YOUNGSTOWN SHEET AND TUBE COMPANY, *et al.*, REPUBLIC STEEL CORPORATION, ARMCO STEEL CORPORATION, *et al.*, BETHLEHEM STEEL COMPANY, *et al.*, JONES & LAUGHLIN STEEL CORPORATION, UNITED STATES STEEL COMPANY, and E. J. LAVINO & COMPANY;

Petitioners,

—v.—

CHARLES SAWYER,

Respondent.

No. 745.

CHARLES SAWYER;

Petitioner,

—v.—

THE YOUNGSTOWN SHEET AND TUBE COMPANY, *et al.*,

Respondents.

**BRIEF FOR PLAINTIFF COMPANIES, PETITIONERS
IN NO. 744 AND RESPONDENTS IN NO. 745.**

Opinion Below

The opinion of the District Court (R. 66) has not yet been officially reported.

Jurisdiction

The judgments of the District Court, granting preliminary injunctions in favor of the plaintiffs,* were entered on April 30, 1952 (R. 76). On the same day the defendant Sawyer* docketed an appeal in the Court of Appeals (R. 77, 442). The Court of Appeals has not acted upon that appeal. Both sides on May 2, 1952 petitioned for certiorari, plaintiffs' petition being No. 744 and Mr. Sawyer's petition being No. 745. Both petitions were granted on May 3, 1952.

Jurisdiction of this Court is invoked under 28 U. S. C. A., §1254(1).

Questions Presented

The questions presented, which were correctly resolved by the District Court, are:

1. Whether Mr. Sawyer had any lawful right to seize the plaintiffs' properties on April 8, 1952, to retain possession of those properties and, as an incident of that possession, to impose on plaintiffs, by executive fiat, new wage scales and terms of employment.

2. Whether the Executive has "inherent power" under the Constitution to authorize seizure of private property on the claim of a "national emergency" when Congress has provided a different remedy—specifically excluding seizure—for just such a "national emergency."

3. Whether plaintiffs, faced with irreparable injury and lacking any adequate remedy at law, are entitled to equitable relief in the form of the preliminary injunctions issued by the District Court.

* To prevent confusion, we shall avoid the terms "petitioner" and "respondent" and shall refer to the parties respectively as "plaintiffs" and "Mr. Sawyer".

Constitutional and Statutory Provisions

The relevant constitutional provisions are Articles I and II, and Amendments IV, V, IX and X of the United States Constitution. Relevant statutory provisions are Sections 101, 206 through 210 of the *Labor Management Relations Act of 1947*, 61 Stat. 136, 29 U. S. C. A. §§158(a)(5), 158(b)3, 158(d), 176-180; Titles II and V of the *Defense Production Act of 1950*, as amended, 64 Stat. 798, 65 Stat. 132, 50 U. S. C. A. App. §§2081, 2121-2123; and *The Universal Military Training and Service Act*, 62 Stat. 625, 50 U. S. C. A. App. §468. They are set forth in Appendix A.

Status of the Parties

All the plaintiffs except E. J. Lavino & Company are steel companies whose plants, facilities and properties were seized by Mr. Sawyer on April 8, 1952 under Executive Order 10340 (R. 6) and Mr. Sawyer's Order No. 1 (R. 22). Lavino manufactures refractories and ferro manganese and is not engaged in the manufacture or fabrication of steel (R. 192). Its plants, facilities and properties were nevertheless included in the seizure orders (R. 11, 26).

All of the plaintiffs (including Lavino) brought actions in the District Court for declaratory judgment and injunction. The cases have not been formally consolidated in this Court, but as they all present the same basic questions they are being heard together upon one printed record; and this brief is filed on behalf of all plaintiffs.*

* In the case of plaintiff Lavino, further grounds for the relief sought in the District Court were pleaded in its complaint and established in the affidavits of its vice presidents, Andrew Leith and George B. Gold (R. 192, 220). For example; it is not engaged in the manufacture or fabrication of steel; its labor classifications and their content are substantially different from those of the steel industry; it was not a party to the controversy before the

Statement of Facts

The true nature of Mr. Sawyer's action here challenged appears clearly upon a review of the background of the dispute which led to his seizure of the plaintiffs' properties on April 8, 1952, and of the events which have occurred since.

*A. Events Before the Seizure**

Plaintiffs, like most other steel companies, had collective bargaining agreements with the United Steelworkers of America, C.I.O. (hereafter called "the Union"), which expired on December 31, 1951 (R. 81, 95). Those agreements provided that the Company and the Union should meet "not less than thirty days and not more than sixty days prior to January 1, 1952" to negotiate the terms and conditions of a new agreement. Inasmuch as the entire contract was open for negotiation for the first time in almost five years, it was apparent at the outset that there would be many issues to be negotiated.** Although the president of the

Wage Stabilization Board; and so forth (R. 192-198, 200-202). Because, however, of the all-inclusive grounds upon which the decision and judgment of the District Court were based, that Court did not have occasion to consider these further grounds in detail, but it did refer to them in its opinion (R. 67). Lavino joined with the other plaintiffs to ask certiorari in No. 744, and joins in this brief, but reserves its right to develop further its own special situation.

* See chronology of negotiations between plaintiff United States Steel Company and the Union, Ex. A to moving affidavit of Mr. Lohrentz (R. 92). Plaintiff Lavino's contract with the Union expired on a different date; and there are other factual differences between it and the other plaintiffs (cf. preceding footnote).

** Report and Recommendations of the Wage Stabilization Board in the Matter of United Steel Workers of America-CIO and Various Steel and Iron Ore Companies (Case No. D-18-C), p. 5. This Report is Appendix IV to affidavit of Harry Weiss, Executive Director of the Wage Stabilization Board (R. 59), and was omitted in the printed record by stipulation (R. 61, 451) since it is available as a separate printed Wage Stabilization Board document. All page references to the Report are to the Wage Stabilization Board print.

Union on November 1, 1951; sent to the plaintiffs a routine request for the opening of negotiations (R. 95), the Union delayed submitting its demands until November 27, 1951 (R. 92). At that time the Union enumerated some twenty-two demands in broad and general terms (R. 92). The full and complex details of the Union's demands were not submitted to any of the steel companies, however, until December 10, 1951. As of that date, the Union's proposals had grown from the twenty-two general demands to more than a hundred separate items (R. 92). As the Union's general counsel explained at the subsequent hearings before a panel established by the Wage Stabilization Board, the twenty-two proposals encompassed "literally 100 contract proposals" (R. 92). Subsequent conferences between the plaintiffs and the Union did not result in progress toward an agreement and on December 22, 1951, the Government intervened in the dispute (R. 92-93).

On that day, the President directed the Wage Stabilization Board to investigate and inquire into the issues in dispute and promptly to report to him its recommendations as to fair and equitable terms of settlement (R. 81). This was a procedure devised by the President *ad hoc**; it was not pursued under any of the established statutory or other procedures. At the same time the President called upon the steel companies and the Union to maintain normal work and production schedules while the matter was before the Board (R. 93). He cited among the reasons for his action the fact that:

"Negotiations between the Union and the steel companies are at an *impasse* and there appears to be no

* The Wage Stabilization Board has no statutory authority for dealing with labor disputes. The Board's only statutory authority is under Title IV of the Defense Production Act of 1950 which relates to problems of wage stabilization.

hope of settlement through mediation. Unless some means is found for breaking this *impasse* a shutdown of the steel industry at the end of this month is in prospect.”*

There is no doubt that the President's action was taken for the purpose of settling a labor dispute and that he was not following statutory procedures designed to prevent work stoppages which would imperil the national health and safety.

The Board on January 3, 1952, appointed a tripartite special steel panel, consisting of two representatives each of the public, the industry, and labor, to hear the evidence and arguments in the dispute and make such reports thereon as the Board might direct (R. 93). The panel held public hearings in Washington on January 10-12, 1952, and in New York City on February 1-16, 1952, and submitted a report dated March 13, 1952, outlining the issues in dispute and summarizing the positions of the parties (R. 61, 93). On March 15, 1952, the Board again requested the parties to continue work and production to permit consideration of the report of the panel (R. 61), and again asked the parties to continue negotiations with a view to reaching a settlement.

“ * * * and with the understanding that the steel companies and the steelworkers will continue work and production and that if by April 4 a mutually satisfactory agreement has not been reached and the Union intends to strike thereafter it will give 96 hours prior written notice to the companies” (R. 94).**

* Statement of the President, dated December 22, 1951, annexed to Weiss affidavit and omitted in printed record (R. 60, 61).

** Report and Recommendations of the Wage Stabilization Board, p. 45.

The Board submitted its report and recommendations on March 20, 1952 (R. 81, 94). These recommendations had no binding authority in law; and the parties had never agreed to be bound by them (R. 164). The Board recommended a general wage increase of $12\frac{1}{2}\text{¢}$ per hour effective as of January 1, 1952, a further increase of $2\frac{1}{2}\text{¢}$ per hour effective July 1, 1952, and an additional increase of $2\frac{1}{2}\text{¢}$ effective January 1, 1953, together with other increases in fringe benefits which in all would impose on plaintiffs, if put into effect, additional employment costs in enormous amounts (R. 94, 164).*

The Board also recommended that the parties include a union shop provision in their new contracts (R. 94).

The Board's recommendations were promptly accepted by the Union (R. 94). They met in substantial part the Union demands. As the dissenting industry members of the Board stated:

"The recommendations as a whole reflect a conscious and admitted effort to recommend terms of settlement which the Union would accept. No similar effort was made to assure that the terms would be acceptable to the companies involved."**

The recommendations of the Board were not acceptable to the plaintiffs. As pointed out by the industry members of

* The affidavit of John A. Stephens, Vice President of Industrial Relations of plaintiff United States Steel Company (R. 99) states that the recommended increases, when applied to all the employees of that company, would increase its direct employment costs in the sum of \$100,400,000 in 1952, and \$141,000,000 in 1953. Affidavits filed by officials of the other plaintiffs disclose the same situation. Thus, the employment costs, alone, of Republic would be increased by at least \$6 per ton, and the average cost of steel products shipped by it would be increased by at least \$12 per ton, or many millions of dollars (R. 164).

** Report and Recommendations of the Wage Stabilization Board, p. 28.

the Board, they were excessive in amount, inflationary in effect, contrary to existing stabilization regulations, and did not make clear and positive recommendations on several issues of great importance to the steel companies. They would impose staggering increases in costs upon the plaintiffs which they could not absorb without risk to the financial stability of their businesses (R. 107-110, 125, 131, 132, 141, 164). Moreover, and very importantly, the union shop recommendation involved a question of employment relationships of fundamental significance to the managements of all the companies.

After an intensive period of negotiation and mediation, the parties failed to reach agreement (R. 15, 142).

On April 4, 1952 the Union gave the previously agreed 96-hour notice of a strike call, effective at 12:01 a.m., April 9 (R. 94).

On the evening of April 8, the President of the United States issued Executive Order 10340 (R. 6, 94). This Order directed the Secretary of Commerce (Mr. Sawyer) forthwith to take possession of such of the plants, facilities and other properties of more than 80 named companies, including the plaintiffs, as he should deem necessary in the interest of national defense, and

“to operate or to arrange for the operation thereof and to do all things necessary for, or incident to, such operation.” (R. 7)

The Executive Order also provided (paragraph 3, R. 8):

“The Secretary of Commerce shall determine and prescribe terms and conditions of employment under which the plants, facilities and other properties possession of which is taken pursuant to this order shall be operated.”

The Executive Order stated that the seizure was made "by virtue of the authority vested in me by the Constitution and laws* of the United States, and as President of the United States and Commander in Chief of the armed forces of the United States * * *" (R. 7).

Likewise on the evening of April 8 and simultaneously with the issuance of the Executive Order, Mr. Sawyer issued his Order No. 1, taking possession, as of midnight that night, of all but a few of the companies listed in the Executive Order. Mr. Sawyer's order recited (R. 22) that the properties seized

"shall include but not be limited to any and all real and personal property, franchises, rights, funds and other assets used or useful in connection with the operation of such plants, facilities and other properties and in the distribution and sale of the products thereof * * *"

excluding railroads and coal and metal mines (R. 22).

Over protest, Mr. Sawyer named the president of each seized company as "Operating Manager for the United States" and directed them to operate their companies subject to his supervision and in accordance with his regulations and orders (R. 22).

* In their argument in the District Court (R. 371) counsel for Mr. Sawyer specifically disclaimed any statutory authority for the seizure, and rested their claims on the Constitution alone.

B. Events After the Seizure

Immediately after the announcement of the seizure, plaintiffs Youngstown, Republic and Bethlehem filed suits against Mr. Sawyer in the United States District Court for the District of Columbia for declaratory judgments holding the seizure illegal, and for injunctions (R. 1, 154, 116).

On April 9, 1952, they applied for temporary restraining orders. Those applications were brought on the same day before Judge Holtzoff. Counsel for Mr. Sawyer opposed, urging that the Executive Branch of the Government had "power to protect the country in times of national emergency by whatever means seem appropriate to achieve the end" (R. 255), that the seizures were legal, and that plaintiffs had an adequate remedy at law. Judge Holtzoff from the bench denied the applications upon the ground that *as of that moment* plaintiffs had not shown irreparable damage (R. 263). Judge Holtzoff added, however,

"True, plaintiff's fear that other drastic steps may be taken which would displace the management or which would supersede its control over labor relations. It seems to the Court that these possibilities are not sufficient to constitute a showing of irreparable damage. *If these possibilities arise, applications for restraining orders, if they are proper and well-founded, may be renewed and considered.*" (R. 265) (Emphasis here and in other quotations throughout this Brief has been supplied)

* Republic, Youngstown, and later United States Steel, each brought two identical suits against Mr. Sawyer, one with a summons calling for a 60-day answer under Rule 12(a), and the other with a summons calling for a 20-day answer under the same rule.

Following Judge Holtzoff's decision, Mr. Sawyer proceeded to make announcements, on several occasions, which indicated his intention—in the words of Judge Holtzoff—to “supersede its [management's] control of labor relations”. He proposed to do this by imposing upon the companies without their consent whatever changes in terms and conditions of employment he saw fit, and by appropriating the companies' funds to put those changes into effect (R. 103). These announcements, if carried out, would have caused irreparable damage.*

Some of the earlier of these announcements are detailed in the moving affidavits (R. 103). Others were publicly repeated almost down to the moment when this Court acted on the afternoon of Saturday, May 3.

Thus on Friday, April 18, Mr. Sawyer announced that on “Monday or Tuesday of next week.” (i.e., April 21 or 22) he would undertake “consideration of an action upon the terms and conditions of employment”. (R. 103) On

* Affidavits before the Court disclosed that increased production costs which might be anticipated from the threatened wage increases could not be recovered except by increase in the selling prices of the products of the companies over and above prices authorized by the Office of Price Stabilization; that the Director of the Office of Price Stabilization had publicly announced that no such price increase would be granted; that wages constituted only a few of approximately 100 issues involved in the labor dispute; that in the experienced opinion of the officials making the affidavits it was not possible to reach a satisfactory over-all agreement by settling one issue at a time, but that successful collective bargaining depended upon a settlement of all the issues as a “package”, so that if Mr. Sawyer were to increase the compensation of the employees without obtaining corresponding concessions from the Union he would permanently impair the bargaining positions of the plaintiffs; and that even if they should regain possession of their properties they would be forced to continue to pay any increased rate of compensation which he might be permitted to establish, and could not reestablish the existing wage scale altered by him without strained labor relations, turmoil, strife and strikes. See, e.g., Stephens affidavit for U. S. Steel (R. 99); Magee and Schlendorf affidavits for Republic (R. 159, 163); Watson affidavit for Youngstown (R. 16); Elliot affidavit for Jones & Laughlin (R. 140); McMath and Bromley affidavits for Bethlehem (R. 123, 130).

Sunday, April 20, he publicly stated categorically that "there will certainly be some wage increases granted" (R. 103).

On April 22 press reports stated that "associates" of Mr. Sawyer had indicated that "it may be another *day or two* before the Government announces a pay raise for the workers in the seized mills". Faced with these repeated threats, the three plaintiffs (Youngstown, Republic and Bethlehem) which had appeared before Judge Holtzoff on the applications for temporary restraining orders brought on motions for preliminary injunctions (R. 13, 166, 128). They were joined by the other plaintiffs (Jones and Laughlin, Armco, United States Steel and Lavino), each of which had in the meanwhile brought similar actions for declaratory judgment and injunction (R. 134, 143, 144, 153, 80, 88, 167, 184).

These motions were extensively briefed and were argued for two days (Thursday, April 24, and Friday, April 25) before Judge Pine (R. 280-427). United States Steel, although its formal motion (like those of the other plaintiffs) was for a preliminary injunction to oust Mr. Sawyer from control of its plants, on the argument limited its prayer to a request that Mr. Sawyer be restrained from changing wages or working conditions pending final hearing (R. 67). But it coupled this prayer with a proposal for "trial on the merits of this case immediately" in contrast to Mr. Sawyer's counsel's opposition to early trial (R. 411).

At the argument before Judge Pine, counsel for Mr. Sawyer declined to give any assurance that his client would not act to change wages or working conditions even while the case was *sub judice* (R. 365-366). Judge Pine thereupon proceeded to work on his opinion, which was delivered on the late afternoon on Tuesday, April 29 (R. 66).

He held that the seizures were illegal and without authority of law, that irreparable damage would result to the plaintiffs, and that possession should therefore be restored to the plaintiffs (R. 73-76). With regard to United States Steel Company's more limited prayer, he said that he

"could not consistently issue such an injunction which would contemplate a possible basis for the validity of defendant's acts, in view of my opinion hereinabove expressed * * * ." (R. 76)

He added:

"If the United States Steel Company wishes to withdraw its verbal amendment and proceed on the basis of its original motion, leave will be granted for that purpose, and the same injunction issued to it as to the other plaintiffs." (R. 76)

This was accordingly done (R. 115, 439).

Immediately upon the announcement of Judge Pine's decision, the Union issued a strike call and its members started to leave the mills. By the next day (April 30) the stoppage was complete.

On April 30, counsel for Mr. Sawyer filed notice of appeal and applied to Judge Pine for a stay of the injunctions pending appeal (R. 77-78). When this was denied (R. 79), they applied on the same day to the Court of Appeals, which, by the narrow margin of 5 to 4, granted a stay effective until this Court acted on a petition for certiorari which Mr. Sawyer's counsel had stated they would file in this Court. The Court of Appeals provided that its stay would continue beyond May 2 only if such petition were filed on that day (R. 442, 444).

On May 1, by the same 5 to 4 vote, the Court of Appeals denied an application by the plaintiffs to insert a condition

in the stay designed to prevent Mr. Sawyer from unilaterally altering terms and conditions of employment pending disposition of Mr. Sawyer's contemplated petition for certiorari (R. 444, 446).

On Friday, May 2, plaintiffs petitioned this Court for certiorari (Docket No. 744). Soon afterwards on the same day Mr. Sawyer likewise petitioned for certiorari (Docket No. 745).

In both petitions, in the reply which each party filed to the petition of the other, and in an *amicus* brief filed by the Union, the question was raised as to a stay of the injunction pending decision by this Court. Counsel for Mr. Sawyer insisted upon an unconditional stay which would leave him free to alter wages and working conditions at any moment. Plaintiffs urged that if any stay were granted it should contain a condition to prevent this from happening.

On the morning of Saturday, May 3, 1952, the President declared that, if the steel companies and the Union did not arrive at a settlement of their labor controversy,

“ * * * the government will be prepared on Monday morning [May 5], or as soon as we can get ready, to order changes in terms and conditions of employment to be put into effect.”

On the afternoon of May 3, this Court granted certiorari in both No. 744 and No. 745, set the case for argument on May 12, and issued a stay of the injunction pending its decision with the direction that Mr. Sawyer should not impose any changes in terms and conditions of employment without the consent of the Union and the companies.

Beginning on Friday afternoon, May 2, and continuing over the week-end, the Union's members started to return to work; and as this brief is written, steel production has returned approximately to normal.

Summary of Argument

This is not a case where the claim can be made that the Executive Branch is compelled to act to meet a sudden and unanticipated national emergency in a situation where no statutory remedy is available. On the contrary, it is action taken for the purpose of settling a labor dispute by executive fiat, inconsistent with, and contrary to, the remedy expressly provided by Congress to meet just such a situation (*infra*, pp. 18-26).

The seizure of plaintiffs' properties and Mr. Sawyer's other action, including his threatened unilateral changes in wages and working conditions, are unlawful and completely without authority under the Constitution and laws of the United States. They are contrary to the traditions of the common law upon which the Constitution was founded. They are not warranted by the Constitution itself, —either in its terms or as construed from the beginning of the Republic until now. They cannot be justified either on the theory of executive responsibility to "take Care that the Laws be faithfully executed," or under the President's power as Commander in Chief, or on any theory of "inherent powers" (*infra*, pp. 27-73).

The seizure, and Mr. Sawyer's threatened action with respect to changing wages and working conditions, have caused and will cause plaintiffs irreparable injury for which there is no adequate remedy at law and for which money damages are not recoverable (*infra*, pp. 74-86).

The preliminary injunctions were providently issued by the District Court. Plaintiffs are entitled to injunctive relief against the seizure, or at the very minimum, to a preliminary injunction against any unilateral changes by Mr. Sawyer in the terms and conditions of employment pending final hearing (*infra*, pp. 86-89).

This is not a suit against the President; and the District Court had jurisdiction to grant the requested injunctions (*infra*, pp. 90-97).

What This Case Does Not Involve

This case does not involve the question whether the nation, or our troops in Korea, need uninterrupted steel production. Obviously they do. Counsel for Mr. Sawyer, in the affidavits submitted in opposition below, and in the petition for certiorari in No. 745, emphasized the vital needs of the nation in this respect. Those needs are not of recent origin; nor has Congress failed to provide lawful means for assuring continued production where the national safety so requires. Those means were available and would have been effective at any time down to the moment of the seizure. Those means were available and would have been effective even at the time the seizure was made. They are available and would be effective now. They will still be available and effective when this Court hands down its decision. Whatever that decision may be, there is no reason why it should in any way affect the production of steel. But the statutory processes have been ignored; and in this fact is found Mr. Sawyer's true intention in seizing plaintiffs' properties. Congress has not provided for compulsory arbitration of labor disputes, and has expressly excluded seizure as a means for dealing with those disputes; yet compulsory arbitration under force of seizure is what Mr. Sawyer now seeks to achieve by imposing new terms and conditions of employment upon all the plaintiffs.

Plaintiffs know as well as Mr. Sawyer the importance of the uninterrupted production of steel. Indeed their future depends upon it. Plaintiffs, like Mr. Sawyer, earnestly desire that no interruption should occur in their operations.

They have no intention of discontinuing operations. They stand ready today, as throughout the period of their negotiations with the Union, to bargain collectively with the Union in the manner prescribed by law.

Nor does this case involve—and we believe this Court will not be concerned with—the merits of the recommendations of the Wage Stabilization Board, or the merits of the respective positions of either the companies or the Union.

The issue, in brief, is not whether steel production must be continued, or how an interruption should be avoided. It is not whether the Union is or is not entitled to more wages, or the companies to higher prices. The sole issue which is before this Court—and which transcends all issues between the companies and the Union—is whether Mr. Sawyer may seize private property, impose by administrative fiat his own settlement of a labor dispute, and proceed to confiscate private property to carry out his views of what that settlement should be.

If arbitrary executive action to force a wage increase is lawful today, then arbitrary executive action to force a wage decrease, or longer hours, or anything else, will be equally lawful tomorrow; and the constitutional rights of all citizens—not of these plaintiffs alone—will be gravely endangered.

ARGUMENT

POINT I

Mr. Sawyer's invasion of plaintiffs' rights is an arbitrary action inconsistent with, and directly contrary to, the remedy expressly provided by Congress.

In their memorandum in the District Court, counsel for Mr. Sawyer stated:

" * * * the sole reason for and object of the Presidential action herein complained of was not, as spokesmen for the steel management have insisted, to settle a labor dispute, but to insure the uninterrupted production of steel during this period of national emergency."
(Memorandum, p. 1.) *

Obviously a steel strike would have the most serious consequences to the nation. Obviously, too, the Union had called a strike. The significant thing is that Congress long ago provided against the very eventuality with which we are now confronted, and with the most deliberately expressed intention specified what should and should not be done. The asserted authorization for Mr. Sawyer's actions plainly and admittedly refuses to follow the process of Congress and insists upon a wholly inconsistent process.

Whether, therefore, Mr. Sawyer's action is described as action to settle a labor dispute—which it obviously is—or action motivated by a desire to continue the production of steel—which we may certainly admit for present purposes—or both, the *fact* is that his action flies squarely in the face of a Congressional prescription *for this precise kind of an emergency*. And the development of the situation as it

* Page references to this memorandum throughout this brief are to the mimeographed memorandum filed on behalf of Mr. Sawyer in the District Court.

existed on April 8 of this year had been months in the making. The situation does not even remotely resemble some overnight catastrophe requiring executive usurpation first and legalization afterward. If, in these present circumstances, executive usurpation is warranted by some law of necessity, then the constitutional right of Congress to provide for emergencies is utterly frustrated by an executive procedure which awaits the creation of the emergency and then insists upon disregarding the means which Congress has provided and using instead a means which is fashioned exclusively by the Executive.

A. Congress has provided for this precise case a remedy which has not been followed.

The Labor Management Relations Act of 1947* created careful procedures for avoiding disastrous consequences to the nation's economy while encouraging mutually satisfactory reconciliation of conflicting interests. By Section 206 of that Act, the President is authorized to appoint a Board of Inquiry when a threatened or actual strike or lockout, affecting an entire industry or a substantial part of it, would imperil the national health or safety. Section 207 empowers that Board to conduct hearings to ascertain the facts of the dispute. After receiving the Board's report, the President is authorized by Section 208 to direct the Attorney General to seek an injunction against the strike or lockout. While the injunction is in effect, the Federal Mediation and Conciliation Service, created by Section 202, is to assist the parties to the labor dispute in their efforts to adjust the settlement of their differences. After 60 days, if the dispute remains unsettled, the Board of Inquiry appointed by the President is to report the current position

* 61 Stat. 136, 29 U. S. C. A. §§176-180; *infra*, Appendix A, pp. 5a-8a.

of the parties, the efforts made for settlement, and a statement of the employer's last offer of settlement. This report is to be made available to the public *and is to be followed, within 15 days, by a secret ballot of the employees to ascertain whether they wish to accept this last offer of settlement.* (Section 209.) When the results of this ballot are certified to the Attorney General, or if a settlement has been reached by the parties, the Attorney General must then move the court to discharge its injunction. After the injunction is discharged, *the President is required to submit to Congress his report, including the findings of the Board of Inquiry, with his recommendations for appropriate action.* (Section 210.) There is, of course, nothing to prevent him from reporting to Congress, and asking additional legislation, at any earlier date.

Accordingly, Congress left no procedural void in its program for protecting the national interest when imperiled by a threatened strike. It did not leave for the Executive the determination of the course of action to be followed when the procedures detailed in the Act are exhausted without the dispute having been settled.

The inescapable intent of Congress was that, if the dispute was not resolved during the 80-day period in which the injunction was in effect, the President should present the situation to Congress for necessary legislation. The Senate Report states that if the dispute is not terminated during the 80-day period, "the bill provides for the President's laying the matter before Congress for whatever legislation seems necessary to preserve the health and safety of the Nation in the crisis." (Sen. Rep. No. 105, 80th Cong., 1st Sess. 15 (1947).)

The fact that subsequent emergency action was specifically left for Congress itself to take is further clearly

shown by the statement on the Senate floor of the author of the bill:

"We did not feel that we should put into the law, as a part of the collective-bargaining machinery, an ultimate resort to compulsory arbitration, or to seizure, or to any other action. We feel that it would interfere with the whole process of collective bargaining. If such a remedy is available as a routine remedy, there will always be pressure to resort to it by whichever party thinks it will receive better treatment through such a process than it would receive in collective bargaining, and it will back out of collective bargaining. It will not make a bona-fide attempt to settle if it thinks it will receive a better deal under the final arbitration which may be provided.

"We have felt that perhaps in the case of a general strike, or in the case of other serious strikes, after the termination of every possible effort to resolve the dispute, the remedy might be an emergency act by Congress for that particular purpose.

"I have had in mind drafting such a bill, giving power to seize the plants, and other necessary facilities, to seize the unions, their money, and their treasury, and requisition trucks and other equipment; in fact, to do everything that the British did in their general strike of 1926. But while such a bill might be prepared, I should be unwilling to place such a law on the books until we actually face such an emergency, and Congress applies the remedy for the particular emergency only. Eighty days will provide plenty of time within which to consider the possibility of what should be done; and we believe very strongly that there should not be anything in this law which prohibits finally the right to strike." (93 Cong. Rec. 3835-36 (1947).)

At the same time Congress expressed its will against the procedure adopted by Mr. Sawyer. A *proposed amendment which would have provided for governmental seizure in the event of emergency was specifically rejected* by an overwhelming vote. (93 Cong. Rec. 3637-3645 (1947).)

Moreover, Mr. Sawyer's actions, both accomplished and threatened, destroy the plaintiffs' rights to collective bargaining conferred by Congressional legislation.

In the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, Congress made it an obligation of both employer and employee to bargain collectively. Prior to that time, only the employer was under a statutory duty to bargain collectively and the employer was not given the correlative right to require bargaining on the part of his employees.

The Act, as amended, preserves the employer's duty to bargain, but in Section 8(b)(3) it places a similar duty on the employees' bargaining representative and thus gives the employer the same right to the process and procedures of collective bargaining as is accorded to the employees' representative. In Section 8(d), also added in 1947, collective bargaining is defined as the "performance of the mutual obligation of the employer and representative of the employees."

The Congressional intent to create for both employer and employee correlative duties and rights to bargain collectively is evident throughout the Senate and House Reports.*

This mutual obligation will be enforced by the courts. Indeed, the courts have recognized the statutory right conferred upon the employer and have enforced the duty of a

* H. R. Rep. No. 245, 80th Cong. 1st Sess. 5, 21 (1947); Sen. Rep. No. 105, 80th Cong. 1st Sess. 22 (1947); H. R. Rep. No. 510, 80th Cong. 1st Sess. 43 (1947).

union to bargain collectively by granting an injunction as requested by the National Labor Relations Board. *Penello v. International Union, United Mine Workers of America*, 88 F. Supp. 935 (D. D. C. 1950); *Madden v. International Union, United Mine Workers of America*, 79 F. Supp. 616 (D. D. C. 1948). And this Court has held in an analogous situation that the duty imposed on a carrier by the Railway Labor Act to treat with the representatives of his employees is enforceable by injunction in a suit brought by the employees' duly accredited representative. The Court observed:

"In considering the propriety of the equitable relief granted here, we cannot ignore the judgment of Congress, deliberately expressed in legislation, that . . . the meeting of employers and employees at the conference table is a powerful aid to industrial peace.

. . . .

"The fact that Congress has indicated its purpose to make negotiation obligatory is in itself a declaration of public interest and policy which should be persuasive in inducing courts to give relief." (*Virginia Railway Co. v. System Federation*, 300 U. S. 515, 551-552 (1937).)

Thus the asserted authorization on which Mr. Sawyer relies, and the action which he is taking, not only run directly counter to the procedures which Congress has established but, in so doing, deny and destroy the statutory rights of the plaintiffs. Under the Congressional prescription for this kind of emergency, the collective bargaining rights of both parties are preserved and equality of bargaining status is not disturbed by arbitrary intervention in support of one party to the labor dispute. Should collective bargaining finally fail, specific Congressional action

would follow with due regard for the interests of both parties.

In fact, the procedures adopted by the Executive were directly contrary to those contemplated and prescribed by the Act, as amended. The Act provides in effect for a period of 80 days of continued bargaining, unprejudiced by the appointment of a board empowered to issue recommendations or by the issuance of recommendations. The referral of the present dispute to the Wage Stabilization Board, with the request that the Board make recommendations, seriously prejudiced the bargaining, because neither side could afford to make concessions which might establish a new floor for the recommendations which the Board would issue. After the recommendations were issued they caused further bargaining difficulties which Congress had foreseen and had attempted to avoid by providing for a board of inquiry *without* power to make recommendations.

B. There Was and Could Be No Valid Reason For Disregarding the Remedy Provided by Congress and Adopting Instead an Entirely Inconsistent and Unlawful Procedure.

It was asserted in the District Court, and it may be asserted here, that the President is not required by law to set in motion in any given case the procedure prescribed by the Labor Management Relations Act. But it does not follow that by failing to use the procedure provided by Congress the Executive can thereby create for itself a right to invoke unwarranted emergency procedures altogether contrary both to the Constitution and to the plain intent of Congress.

In the District Court, the chief excuse advanced for not following the procedure laid down by Congress was that during the period from the commencement of negotiations in November 1951 to their breakdown in April 1952 the

Union had voluntarily allowed its members to remain at work for more than the 80-day "cooling-off period" prescribed by the Labor Management Relations Act. It is not claimed that this voluntary abstention by the Union operated to bar the Government, on any theory of estoppel, from using the remedies provided by Congress; and during this voluntary abstention period there was of course no resort to the procedures laid down by the Act, including particularly the provision for a secret ballot of the employees to ascertain whether they wished to accept the last offer of settlement made by management.

It has also been suggested that resort, either at the time of the seizure or now, to the remedy provided by Congress might be futile, since it might simply postpone the problem for another 80 days. This is sheer speculation. Among other things, the argument leaves out of account (i) that during the 80 days there might be a settlement, (ii) that the members of the Union by secret ballot under §209 of the Act—an opportunity denied to them under the present procedure—might choose to accept management's last offer, and (iii) that within the 80 days there would be ample time for Congress to provide the necessary remedies along the lines already mentioned (*supra*, pp. 20-21). The mere claim that the remedy provided by Congress *might* not work is no excuse for disregarding it and resorting instead to entirely extra-legal action.

The assertion was also made below that when the seizure was made on April 8, a strike call was already out and it would have been too late to obtain an injunction under the Act in order to prevent a shutdown. All other considerations apart, this argument overlooks the fact that under the arrangements made before the Wage Stabilization Board the Union had agreed to give, and actually gave, 96 hours notice of its strike call. In at least one previous case (the Longshoremen's strike of August 1948, noted

below*) a four-day period was adequate to set in motion the entire emergency machinery of the Act, down to and including the issuance of an injunction.

When Mr. Sawyer, in justifying his action here, relies on Executive Order 10340 to the exclusion of the remedy provided by Congress, he poses for the Court's resolution a square conflict between the word of Congress and the will of the Executive. To resolve that conflict, the Constitution, and centuries of struggle against the dominion of executive power, will point the way.

* The emergency machinery of the Labor Management Relations Act has been invoked on at least nine occasions since its passage. In six of these, injunctions were secured by the Attorney General. These cases were:

March 1948, *Carbide & Carbon Chemical Corporation*—Exec. Order No. 9934, 13 Fed. Reg. 1259. Injunction issued. Dispute settled by direct negotiation between the parties with assistance of the Federal Mediation and Conciliation Service.

March 1948, *United Packing House Workers of America (Meat Packers' strike)*—Exec. Order No. 9934A, 13 Fed. Reg. 1375. Board appointed but no injunction issued.

March and June 1948, *United Mine Workers of America (coal strike, two cases)*—Exec. Orders 9939 and 9970, 13 Fed. Reg. 1579, 3333. Temporary restraining order and injunction issued. Dispute as to pension fund settled in collateral court proceeding and other issues settled by direct negotiation between the parties.

May 1948, *American Union of Telephone Workers (American Telephone and Telegraph Company)*—Exec. Order No. 9959, 13 Fed. Reg. 2707. Board appointed but no injunction issued.

June 1948, *Shipping strike*—Exec. Order No. 9964, 13 Fed. Reg. 3099. Injunction issued.

August 1948, *Longshoremen's strike*—Exec. Order No. 9987, 13 Fed. Reg. 4779. Injunction issued. This instance illustrates the rapidity with which the emergency machinery can operate. The President appointed a statutory board of inquiry on August 17, 1948. The board held hearings on August 18 and reported back to the President on August 19. An injunction was issued on August 21.

February 1950, *United Mine Workers of America (coal strike)*—Exec. Order No. 10106, 15 Fed. Reg. 649. Temporary restraining order issued five days after the appointment of the board of inquiry, which had reported back to the President on the day the order was issued.

August 1951, *Non-ferrous metal strike*—Exec. Order No. 10283, 16 Fed. Reg. 8873. Injunction issued. Dispute settled by direct negotiation between the parties.

POINT II

The seizure of plaintiffs' properties and Mr. Sawyer's other action, including that threatened with respect to wages and other conditions of employment, are unlawful and unconstitutional.

Mr. Sawyer's seizure and control of plaintiffs' plants and other facilities, including his threatened action with respect to terms and conditions of employment, are based on the claimed authority of Executive Order No. 10340. The Order by its terms purports to be issued under the "Constitution and laws of the United States." In fact, the Order and Mr. Sawyer's action thereunder find support in no constitutional provision or law of the United States.

As is clear from the memorandum filed on Mr. Sawyer's behalf in the District Court, the asserted right to seize and exercise control over the steel industry—including the right to supplant the steel companies in collective bargaining and to change terms of employment—rests solely upon a claimed prerogative or "inherent power" of the President as Chief Executive and as Commander in Chief of the armed forces. These purported rights are claimed to inure to the Executive simply by virtue of his office. Under Mr. Sawyer's position the President may exercise virtually unlimited powers in any field where he chooses to say that an emergency exists. For, in his counsel's view, the Executive declaration of emergency is non-reviewable and, once the emergency is proclaimed, the Executive action is beyond the control of the Courts.

This position was thus stated by Mr. Sawyer's counsel in the argument before Judge Pine:

"The Court: So you contend the Executive has unlimited power in time of an emergency?

Mr. Baldrige: He has the power to take such action as is necessary to meet the emergency.

The Court: If the emergency is great, it is unlimited, is it?

Mr. Baldrige: I suppose if you carry it to its logical conclusion, that is true. But I do want to point out that there are two limitations on the Executive power. One is the ballot box and the other is impeachment.

The Court: Then, as I understand it, you claim that in time of emergency the Executive has this great power.

Mr. Baldrige: That is correct.

The Court: And that the Executive determines the emergencies and the Courts cannot even review whether it is an emergency.

Mr. Baldrige: That is correct." (R. 371-372)

* * * * *

"The Court: So, when the sovereign people adopted the Constitution, it enumerated the powers set up in the Constitution but limited the powers of the Congress and limited the powers of the judiciary, but it did not limit the powers of the Executive.

Is that what you say?..

Mr. Baldrige: That is the way we read Article II of the Constitution." (R. 377)

* * * * *

"It is our position that the President is accountable only to the country, and that the decisions of the President are conclusive." (R. 380)

This concept of unbridled and unchecked executive power is presented in its most extreme posture by the ac-

tion here challenged. The seizure reflects a complete disregard of the statutory machinery established by Congress, in keeping with its responsibility under the Constitution, for the handling of the labor dispute in the steel industry. Again, in flat disregard of the Congressional mandate guaranteeing an employer the right to bargain collectively with his employees, Mr. Sawyer has announced his intention to increase the wages of plaintiffs' employees and has declined to give any assurance that he would not do this while the case was *sub judice*. In essential analysis, this is an attempt, without any vestige of statutory authority and solely on the assertion of inherent executive power, to appropriate plaintiffs' funds for payment of wages in whatever amounts Mr. Sawyer may choose to establish.

Before considering the pertinent provisions of the Constitution, and the scope of the powers it confers on the respective branches in our tripartite system of government, it would appear in order to review briefly the English common law background which so strongly affected the form of our government and had so direct a causal connection to the guarantees of liberty established in the Constitution. For this claim of an inherent overriding power in the Executive to act by fiat in disregard of the law is not a new one. It is precisely the claim which was at the root of centuries of bloody struggle to overcome the absolutism of the English Crown. It was precisely the threat against which the Founding Fathers established safeguards by specifically limiting executive power in framing the Constitution of the United States.

A. The Necessary Background—the Successful Struggle Against the Crown Prerogative and its Culmination in the Constitution of the United States.

We have no intention of burdening the Court with an extended account of the continuous controversy in 17th century England over the royal prerogative. This is a story known in detail by the Founding Fathers, known in basic outline by most Americans and well documented elsewhere. See, *e.g.*, Trevelyan, *England Under the Stuarts* (17th Ed. 1938); Davis, *The Early Stuarts 1603-1660* (1937); Corwin, *Liberty Against Government* (1948). But a brief discussion of that controversy, and its effect on the content of the Constitution of the United States, is singularly pertinent here. For here we have a striking example of the maxim that history repeats itself.

The present claim of the Executive to an inherent right to do whatever he considers necessary for what he views as the common good—without consulting the legislature and without any authority under law—is not a new claim. It is precisely that which was made more than three centuries ago by James I of England when he claimed for himself the right to make law by proclamation and asserted that it was treason to maintain that the King was under the law. It is precisely the claim for which Charles I lost his life and James II his throne. Most importantly, it is precisely the claim for which George III lost his American colonies. In short, it was the continued effort of the English Crown to exercise unfettered prerogative that culminated in the War of Independence and the establishment of the United States under the form of government provided in the Constitution.

The controversies over the prerogative of the English King demonstrate two significant propositions which em-

phasize the restricted scope of the responsibilities conferred upon the President in the United States Constitution.

First, the prerogative of the English Crown, as understood at the time our Constitution was drafted, embodied no such rights of arbitrary control over private property as those now asserted under the Executive Order.

Second, the Founding Fathers—fresh from the successful struggle of the American colonies against the Crown and fully mindful of the long and bitter struggle that had been required to place that Crown under the law—made it clear that, in establishing the office of the Presidency, they were creating a position of far more circumscribed powers than those then attributed to the Crown.*

The development of the citizen's right in English-speaking countries to protection against arbitrary acts of the Executive is summarized in chapter 2 of Corwin's *Liberty against Government* (1948). The story is as old as Magna Carta.

Chapter 39** of Magna Carta says:

* See, e.g., Corwin, *The President: Office and Powers* 365 (3d Ed. 1948).

** Chapter 39 of Magna Carta was copied verbatim in some of the early State Constitutions. In *Bank of Columbia v. Okely*, 4 Wheat. 234, 242 (1819), this Court held that it was

"intended to secure the individual from the arbitrary exercise of the powers of Government, unrestrained by the established principles of private rights and distributive justice."

And in *Murray's Lessee, et al. v. Hoboken Land and Improvement Co.*, 18 How. 272, 276 (1855), interpreting the Fifth Amendment to the Constitution, this Court said:

"The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta*. Lord Coke, in his commentary on those words (2 Inst. 50), says they mean due process of law."

"No freeman shall be taken, or imprisoned, or be *disseised* of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor will we send upon him, but by lawful judgment of his peers, or by the law of the land."

At least five other articles in the Great Charter (Nos. 28, 30, 31, 52 and 56) deal with wrongful seizures of private property by the Crown, and give assurances that they will not be repeated and that property unlawfully taken will be restored.

As Professor Corwin points out, these provisions of Magna Carta were absorbed into the principles of the common law. They were well established as a part of that law when Sir John Fortescue, for 18 years Chief Justice of the King's Bench, somewhere around the year 1468 wrote his famous treatise *De Laudibus Legum Angliæ*. The whole thesis of that book was to contrast the limited constitutional powers of the British Crown as they existed even as early as the Wars of the Roses, with the arbitrary powers of continental rulers. In Chapter 9 (and again in Chapter 36) Fortescue points out that the King of England

"can neither make any alteration, or change in the laws of the realm without the consent of the subject, nor burden them, against their wills, with strange impositions, so that a people governed by such laws as are made by their own consent and approbation enjoy their properties securely and without the hazard of being deprived of them, either by the King or any other."

Centuries later it was to Magna Carta, and to Fortescue, that Coke appealed when he and the other judges of England declared

" * * * that the King hath no prerogative, but that which the law of the land allows him." (*Case of Proclamations*, 12 Coke's Reports 74, 77 English Reprint 1352, 1354.)

and that

"The common law has so limited the prerogatives of the King that they shall not take away or prejudice anyone's inheritance." (i.e., anyone's private property.) (2 Inst. 63; 3 Inst. 84.)

And in the *Case of Prohibitions*, 12 Coke's Reports 63, 77 English Reprint 1342, 1343, the Judges laid down that the King could not take upon himself the power to give judgment in any case, since that was a matter for the courts—

" * * * with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as^o he said; to which I said, that Bracton said, *quod Rex non debet esse sub homine, sed sub Deo et lege.*"

The controversies between the Crown and Parliament came to a head under Charles I in the celebrated *Case of Ship Money* (*The King v. John Hampden*), reported in 3 Howell's State Trials 826 (1637). What is particularly interesting about that case in the present connection is that the Crown lawyers based their claims squarely upon the claims of "national emergency," "common defense" and "inherent powers of the Commander in chief."

After proclamations had been made reciting that although England was then at peace there were wars raging on the continent of Europe, that the seas were unsafe, and that England was in danger of losing control of the sea and

of invasion, the King required various counties forthwith to provide ships for the common defense. One citizen (John Hampden) resisted. His case was heard in the Exchequer Chamber before all twelve judges of the three common-law courts.

The Solicitor General and Attorney General, appearing for the Crown, put their arguments squarely on the inherent emergency powers of the King as Commander in Chief, and argued that in time of emergency even Magna Carta and statutes must give way to those "inherent powers."

A majority of the judges accepted the King's views. Mr. Justice Crawley, in words surprisingly similar to the contentions advanced on behalf of Mr. Sawyer in the case at bar, said:

"It doth appear by this record, that the whole kingdom is in danger, both by sea and land, of ruin and destruction, dishonor and oppression, and that the danger is present, imminent and instant, and greater than the king can, without the aid of his subjects, well resist: Whether must the King resort to Parliaments? No. We see the danger, is instant and admits of no delay." (3 Howell's State Trials at 1087.)

In the same vein, other judges asserted that any statute which attempted to bind the King's prerogative as Commander in Chief was invalid, that Parliament moved too slowly in emergencies, and that the King was the sole judge of the necessity.*

* Professor Corwin (The President: Office and Powers 494, fn. 70) says:

"The classic expression of Stuart theory is Justice Vernon's statement in the Ship Money Case: 'The King *pro bono publico* may charge his subjects for the safety and defense of the kingdom, notwithstanding any act of Parliament, and a statute derogatory from the prerogative doth not bind the king, and the king may dispense with any law in cases of necessity.' *Rex v. Hampden*, 3 S. T. 825 (1637)."

A minority of judges, headed by Croke, voted against the King. But the aftermath was interesting. In 1640 Mr. Justice Crawley (author of the statement above quoted) and some of his colleagues who had voted for the King were impeached for having

“ * * * traitorously and wickedly endeavored to subvert the fundamental laws and established government of the realm of England; and instead thereof, to introduce an arbitrary and tyrannical government against law * * * ” (3 Howell's State Trials 1283).

The judgment in the *Ship Money* case itself was directed by Parliament to be cancelled as being

“ * * * against the laws of the realm, the subject's right of property, and contrary to former resolutions in Parliament and to the Petition of Right ” * (3 Howell's State Trials 1261).

In the reign of James II the controversy broke out afresh. The King claimed the power in cases of urgent necessity to dispense with the laws. Finally, when he pushed the matter too far by indicting for seditious libel those who opposed his views, there was a reaction; and in the *Case of the Seven Bishops* (12 Howell's State Trials 183) Mr. Justice Pgwel declared that the claimed royal prerogative “ amounts to an abrogation and utter repeal of all the laws ” and that:

“ If this be once allowed of, there will need no parliament; all the legislature will be in the king, which is a thing worth considering. ” (12 Howell's State Trials 427.)

* 3 Car. I, c. 1 (1628).

The culmination was the exile of James II. and the passage under his successors of the English Bill of Rights (1 Will. & Mary Sess. 2, c. 2 (1688)), from which many of the provisions of our own Bill of Rights are taken. That document specifically limited the powers of the Crown in the following respects:

"1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.

"2. That the pretended power of dispensing with laws, or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal."

Thus, by the start of the 18th-century, the English people, after a long and frequently bloody struggle, finally established that the Crown was under the law. It was clear that the seizure of property by the Crown without authority of Parliament was illegal.

In the decades preceding the War of Independence the American colonists were faced with their own struggle against the actions of George III and his ministers. Throughout the struggle, the colonists constantly appealed to their fundamental rights as Englishmen under Magna Carta and the English Bill of Rights.* In cataloging the grievances of the colonists against the King, the Declaration of Independence states that he "has kept among us, in times of peace, standing Armies without the consent of our legislature" and "has affected to render the military independent of and superior to, the Civil Power." Various attempts of British generals at the beginning of the Revolution to enforce martial rule were denounced by the legislatures of the various colonies as tyrannical and despotic.

* See, e.g., Resolutions of the First Continental Congress quoted in 2 Tucker on the Constitution 886, et seq.

See Whyte, *The War Powers of the President* [1943] Wis. L. Rev. 205, 210.

"It was against this background that the Founding Fathers drafted our Constitution. The constitutional debates, as reported in Madison's Journal, reveal with graphic clarity that the delegates had firmly in mind the recent excesses of the English Crown against the colonies and the long and costly struggle that had been waged by the people of England and of other European countries, such as Holland, before the royal power had been circumscribed and placed under the law.* It was in this framework that the delegates—all men who knew at first hand the evil resulting from the unfettered exercise of the royal prerogative, and many of them lawyers deeply read in the constitutional history of the mother country—drafted our own Constitution. It is against this real fear of uncontrolled executive action that the provisions of the Constitution must be considered.

B. The Constitution Provides No Authority for the Seizure or for Mr. Sawyer's Other Actions.

As is well known, the framers of the Constitution believed firmly that in a tripartite form of government lay one of the surest safeguards of the people's liberties.** They took especial care, therefore, to prevent any concentration of executive and legislative powers in the same hands.

Article I, sec. 1 of the Constitution unequivocally vests in Congress alone all legislative powers granted. Article I, sec. 8 enumerates powers granted to Congress—includ-

* Madison's Journal, reprinted in H. R. Doc. No. 398, 69th Cong., 1st Sess. 109 (1927), at, e.g., 132-133, 149-151, 397, 417-421.

** See, e.g. Madison in *The Federalist*, Nos. 47 and 48; and compare *Kilbourn v. Thompson*, 103 U. S. 168 (1881).

ing the power to "lay and collect Taxes, Duties, Imports and Excises, to pay the debts and provide for the common Defense and general Welfare of the United States" [cl. 1]; "to regulate commerce * * *" [cl. 3]; and several powers relating to the declaration and waging of war [cl. 11-16]. Section 8 concludes with the authorization "To make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof" [cl. 18]. In this clear-cut fashion the Constitution places in Congress the exclusive power to enact all laws necessary for the welfare and defense of the nation. The responsibility for legislation to cope with emergencies, both military and otherwise, is categorically vested in Congress.

The office of the Presidency is covered in Article II. It opens with a provision [sec. 1, cl. 1] that "The executive Power shall be vested in a President of the United States of America" and proceeds to define that power. The responsibilities assigned to the President, in keeping with the division of powers basic to the tripartite system of government, are intrinsically executive and administrative. The provisions of the Article upon which Mr. Sawyer apparently relies as authority for his actions, in addition to the clause just quoted, are these:

"Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; * * *

"Section 3. * * * he [the President] shall take Care that the Laws be faithfully executed * * *"

The duty to execute the laws is by its terms an executive function—to implement and administer the laws enacted

by Congress.* It is equally clear, as a matter of both history and settled judicial interpretation, that the President's military power as Commander in Chief is limited to a command or executive function—the direction of the armed forces. The President's military functions do not encompass any power to legislate on war or related questions.

Although the Executive, as is apparent from Executive Order 10340, claimed in this case to be acting pursuant to a power asserted to exist in a national emergency, it will be observed that the Constitution nowhere confides in the Executive any express power to take such undefined action as he deems best for the public interest, either in an emergency or otherwise. On the contrary, Article II, Section 3, provides that from time to time the President *shall* "give to the Congress Information as to the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient" and *may* "on extraordinary occasions"*** convene both Houses or either of them.

Thus the power to frame measures and provide legal remedies, on both ordinary and extraordinary occasions, is reposed exclusively in the Legislative Branch.

* This provision, together with the provision in section 1 that "the executive Power shall be vested in a President," grants to the President the incidental authority required to insure the functioning of the Executive Branch of the Government. See *Myers v. United States*, 272 U. S. 52, 163-164 (1926), where the Court in holding that the President may remove a postmaster without the assent of the Senate, stated "Article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers * * *". Certain broad language in the *Myers* case with regard to executive power was expressly disapproved in *Humphrey's Executor v. United States*, 295 U. S. 602, 626 (1935).

** Cf. Story, *The Constitution*, §1562 (Cooley's Ed. 1873) where the author justifies and explains this provision by stating:

"Occasions may arise in the recess of Congress requiring the Government [i.e., the President and Congress together] * * * to provide adequate means to mitigate or overcome unexpected calamities."

If there is any such thing as a "residuum of powers" inherent in the Federal government under the Constitution, it is in Congress, and not in the President, under Article I, Section 8, Clause 18, quoted *supra*, p. 38. That any "residuum of power" not conferred expressly upon either the President or Congress is reserved to the States or to the people, and therefore is not vested in the President, is made clear by Amendments IX and X.

It is axiomatic that each branch of our Government is under, and not above, the Constitution. The President, like Congress, possesses no power not derived from the Constitution. *Ex parte Quirin*, 317 U. S. 1, 25 (1942); *Ex parte Milligan*, 4 Wall. 2, 136-137 (1866); *Lichter v. United States*, 334 U. S. 742, 779 (1948); *House v. Mayes*, 219 U. S. 270, 281-282 (1911).

As this Court said in the *Lichter* case:

"In peace or in war it is essential that the Constitution be scrupulously obeyed, and particularly that the respective branches of the Government keep within the powers assigned to each by the Constitution." (334 U. S. at 779.)

If executive action is not authorized under these constitutional provisions or taken pursuant to Congressional statute, it is invalid. There is no place under the Constitution for the concept, familiar both to monarchy and dictatorship, of "inherent powers" or a "residuum of powers" beyond those specifically granted by the charter. As stated in *Toledo, Peoria and Western R. R. v. Stover*, 60 F. Supp. 587, 593 (S. D. Ill. 1945):

"The executive department of our government cannot exceed the powers granted to it by the Constitution and the Congress, and if it does exercise a power not granted to it, or attempts to exercise a power not

granted to it, or attempts to exercise a power in a manner not authorized by statutory enactment, such executive act is of no legal effect."

In *United States v. Western Union Telegraph Co.*, 272 Fed. 311 (D. C. N. Y. 1921), *aff'd*, 272 Fed. 893 (2d Cir. 1921), remanded by stipulation for dismissal of bill without prejudice, 260 U. S. 754 (1922), Judge Augustus N. Hand rejected the contention that the President possesses inherent or other power to legislate in the public interest. In holding that the President had no power to prevent a domestic cable company from landing its cable in the United States, although presidents had asserted the executive power to regulate this matter independently of statute for fifty years, Judge Hand said:

"The implications of the power contended for by the government are very great. If the President has the right, without any legislative sanction, to prevent the landing of cables, why has he not a right to prevent the importation of opium on the ground that it is a deleterious drug, or the importation of silk or steel because such importation may tend to reduce wages in this country and injure the national welfare?" (272 Fed. at 315.)

See, to similar effect, William Howard Taft's study of the Presidency. Taft, *Our Chief Magistrate and His Powers*, 139-140 (1916):

"The true view of the Executive functions is, as I conceive it, that *the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise*. Such specific grant must be either in the

Federal Constitution or in an act of Congress passed in pursuance thereof.

There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest, and there is nothing in the Neagle case and its definition of a law of the United States, or in other precedents, warranting such an inference. The grants of Executive power are necessarily in general terms in order not to embarrass the Executive within the field of action plainly marked for him, but his jurisdiction must be justified and vindicated by affirmative constitutional or statutory provision, or it does not exist."

It is against this constitutional framework, so carefully wrought by the Founding Fathers to insure lasting protection of the citizen's liberties, that this seizure must be tested.

As Mr. Justice Frankfurter said in his concurring opinion in *United States v. United Mine Workers of America*, 330 U. S. 258, 307 (1947):

"The historic phrase 'a government of laws and not of men' epitomizes the distinguishing character of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights he was not indulging in a rhetorical flourish. He was expressing the aim of those who, with him, framed the Declaration of Independence and founded the Republic. 'A government of laws and not of men' was the rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power. Every act of government may be challenged by an appeal to law, as finally pronounced by this Court."

So challenged, this seizure cannot be squared with the Constitution and is necessarily invalid. Far from finding

support in the Constitution, it is a classic example of precisely the type of rule by fiat which can have no place in a government of laws and not of men.

C. This Seizure, Far from Being Authorized Under the Executive Responsibility to Execute the Laws, is in Conflict With the Laws as Enacted by Congress.

The present proceeding involves a continuing problem—the handling of labor disputes of national importance—plainly within the province of Congress. Procedures to be followed in dealing with these disputes call for Congressional action. There can be no argument about this. And Congress has acted. After extensive consideration and mature deliberation Congress enacted, in the Labor Management Relations Act of 1947, detailed legislation governing labor disputes affecting the national health or security.

The Constitution charges the President with the faithful execution of the laws. In the present controversy he has failed to discharge this responsibility and has refused to apply the Labor Management Relations Act. The applicable procedures provided in the Act have been ignored. Instead Mr. Sawyer, under the purported authority of the Executive Order, has seized plaintiffs' private property and supplanted plaintiffs in their collective bargaining with their employees, and now threatens to use plaintiffs' funds to pay wages at whatever scale he chooses to adopt. Seizure—precisely the disruptive and undemocratic action which Congress rejected as a means of handling labor disputes—has been applied by executive fiat. On its face this action cannot be defended as the execution of the laws of the United States; it is precisely the reverse.

In the first years of the Republic, this Court firmly established that under the Constitution there could be no execu-

tive encroachment on authority vested by the Constitution in Congress. In *Little v. Barreme*, 2 Cranch 170 (1804), this Court, speaking through Chief Justice Marshall, sharply rejected the attempt by the President to usurp Congressional power.

That case involved an act passed by Congress in 1799 suspending commercial intercourse between the United States and France during the undeclared naval war between the two nations. The act provided that no American vessel should be permitted to proceed to any French port under penalty of forfeiture. A further provision authorized the President to instruct commanders of United States armed vessels to stop and examine any American vessels on the high seas suspected of engaging in the prohibited traffic and authorized the seizure of any such vessels sailing to any French ports. President Adams sent copies of the statute to the commanders of United States vessels, accompanied by written instructions directing them to seize all American ships bound to or from French ports. Acting under these presidential instructions, Captain Little stopped and seized on the high seas a vessel bound from a French port.

This Court unanimously affirmed an order which restored the seized vessel to its owner and directed Captain Little to pay damages for the seizure. The Court, after first posing the question whether the President would have had the power in the absence of Congressional action to order the seizure of vessels engaged in the illicit traffic, pointed out that Congress had prescribed by its legislation the manner in which seizures were to be carried into execution and had excluded the seizure of any vessel bound from rather than to a French port.* The Court held that, even though the

* This Court there said, 2 Cranch-170, 177: "It is by no means clear that the President of the United States, whose high duty it is to 'take care that the laws be faithfully executed,' and who is commander in chief

executive construction (extending the power of seizure to vessels bound from as well as to French ports) was calculated to increase the effectiveness of the legislation, the Executive had no right, either under his general power as Commander in Chief or under the guise of faithfully executing the laws, to expand the law as enacted by Congress.

Only a few years after the decision in *Little v. Barreme*, a similar holding was made by Mr. Justice Johnson of this Court, sitting on Circuit, and District Judge Bee in *Gilchrist v. Collector of Charleston*, 10 Fed. Cas. 355 (C. C. D. S. C.; 1808). There the Embargo Acts of the Jefferson Administration had forbidden American vessels to trade with foreign ports, but permitted coastwise shipping to continue. One provision of law authorized Collectors of Customs to detain vessels ostensibly bound on a coastwise voyage, "when- ever, in their opinion, the intention is to violate or evade" the Embargo Act. The Secretary of the Treasury, under instructions from President Jefferson, instructed the Collector of Customs at Charleston to detain all vessels carrying specified cargoes, regardless of where they were bound or whether the Collector had any reason to believe that there was an intention to evade the Act.

of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce. But when it is observed that the general clause of the first section of the act, which declares that such vessels may be seized, and may be prosecuted in any district or circuit court, which shall be holden within or for the district where the seizure shall be made, obviously contemplates a seizure within the United States; and that the 5th section gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound; or sailing to, a French port, the legislature seems to have prescribed that the manner in which this law shall be carried into execution was to exclude a seizure of any vessel not bound to a French port."

The Court rejected this attempted expansion, by Presidential order, of the detention provisions laid down by statute, and issued a mandamus against the Collector to compel him to clear the vessels which he had detained under Presidential instructions.*

The basic constitutional principles which caused the judiciary to strike down the executive encroachment are as controlling today as they were in the time of *Little v. Barreme* and *Gilchrist v. Collector*. There the basic principle that the executive must stay within the bounds of law was held to require the rejection of executive action which might plausibly be said to be compatible with the Acts of Congress and adapted to carrying out their general intent. Here, even such conceivable basis for the executive action is plainly lacking. By no stretch of the imagination can Mr. Sawyer's actions be said to be calculated to give effect to the laws passed by Congress covering emergency labor disputes.

The Labor Management Relations Act was enacted by Congress on June 23, 1947, just one week before the expiration of the War Labor Disputes Act.**

* Following the decision in *Gilchrist v. Collector*, the report (10 Fed. Cas. at 357) quotes in full an opinion rendered by the Attorney General to President Jefferson on the subject, in which the Attorney General argued that the courts had no authority to interfere by mandamus with an Executive Order, and that the responsibility of the President was "to the court of impeachment and to the nation" and not to the courts. Mr. Justice Johnson thereupon placed on record (10 Fed. Cas. at 359 *seq.*) an explanation of his opinion and an answer to the Attorney General. His views are particularly apposite, since they anticipate, and demolish, substantially every argument made by Mr. Sawyer's counsel in the case at bar.

** The War Labor Disputes Act, which had authorized the President under certain specified conditions to seize facilities necessary for prosecution of the war, expired by its terms six months after the declaration by the President of the cessation of hostilities in World War II, i.e., on June 30, 1947, the Presidential declaration having been made on December 31, 1946 (Proclamation 2714, 12 Fed. Reg. 1).

The authorization of seizure in particular cases and within limits laid down by law is not new or unfamiliar to Congress. At many times in the past, and

The pattern established by Congress in the Labor Management Relations Act is unmistakably clear. If the labor dispute cannot be resolved during the 80-day period provided by the Act, the President is to report the emergency problem to Congress for its action. Seizure was not authorized. Congress, when the device of seizure was proposed, firmly and formally rejected its use in dealing with the problem (*supra*, p. 22).

The Executive Order and Mr. Sawyer's action must be considered in the framework of this unequivocal Congressional action. It is difficult to conceive of Executive action more directly inconsistent with Congressional intent.

On every proper occasion which has arisen since this seizure, Congress has expressed its opposition. In passing the Emergency Powers Interim Continuation Act, which authorized a short-term extension of certain designated emergency statutes, Congress pointedly provided that nothing contained in the Act

“shall be construed to authorize seizure by the government, under the authority of any act herein extended, of any privately owned plants or facilities which are

even now, Congress has authorized seizure as a method of dealing with specific problems affecting the national interest. Outstanding examples of Congressional authorization of seizure are as follows:

Railroad and Telegraph Lines Seizure Act of 1862, c. 45, 12 Stat. 334, (January 31, 1862);

National Defense Act of 1916, c. 134, §120, 39 Stat. 213-214 (June 3, 1916);

Transportation System Control Act of 1916, c. 418, §1, 39 Stat. 645 (August 29, 1916);

Selective Training and Service Act of 1940, c. 720, §9, 54 Stat. 892 (September 16, 1940);

War Labor Disputes Act of 1943, c. 144, §§3-6, 57 Stat. 164-166 (June 25, 1943);

Universal Military Training and Service Act of 1948, c. 625, Title 1, §18, 62 Stat. 625 (June 24, 1948);

Defense Production Act of 1950, c. 932, Title 2, §201, 64 Stat. 799 (September 8, 1950); c. 275, Title 1, §102(b), 65 Stat. 132 (July 31, 1951).

not public utilities." (Pub. L. No. 313, 82nd Cong., 2d Sess. § 5, April 14, 1952.)

Similarly the Senate, in passing on the Third Supplemental Appropriations Act of 1952, specifically provided that none of the funds appropriated shall be used for the purpose of enforcing Executive Order 10340. See 98 Cong. Rec. 4192, 4216 (April 21, 1952). In at least two later instances the Senate has reiterated its view by placing this same prohibition on appropriation measures. Treasury and Post Office Departments Appropriations, 1953, 98 Cong. Rec. 4579 (April 28, 1952), 4617 (April 29, 1952); Labor-Federal Security Appropriation, 1953, 98 Cong. Rec. 4621, 4626 (April 29, 1952).

The situation is precisely the converse of that in which unauthorized and illegal executive action has on occasion been deemed ratified by the subsequent appropriation of funds for the particular purpose. See, *e.g.*, *Isbrandtsen-Moller Co. v. United States*, 300 U. S. 139, 147 (1937). Consistent with the dignity of our tripartite system of government,* Congress has taken issue with and expressed its objection to the unwarranted seizure.

The unauthorized action of the Executive in this instance must also be contrasted with the joint exercise of the war powers by Congress and the President, exemplified by the wartime curfew program upheld in *Hirabayashi v. United States*, 320 U. S. 81 (1943). There, in affirming a conviction of violation of a statute making it a misdemeanor to dis-

* A strong deterrent to additional formal Congressional action against Mr. Sawyer's unconstitutional exercise of the executive power has been the realization that the unwarranted executive action should be handled by the judiciary in the exercise of its responsibilities under the Constitution. This salutary attitude that the interests of our form of Government are best served by having constitutional rights protected by the courts has been constantly reiterated in Congress since the seizure of plaintiffs' properties under the purported authority of the Executive Order. See, *e.g.*, 98 Cong. Rec. 4067 (April 16, 1952), 4159 (April 18, 1952), 4193, 4197 (April 21, 1952); 4287 (April 22, 1952).

obey curfew orders promulgated by military commanders pursuant to an executive order, this Court concluded that the statute had ratified and confirmed the executive order. The Court, after emphasizing that the statute on which the conviction was based contemplated and authorized the curfew order, pointed out that in essence the case involved the cooperative action of Congress and the Executive.

The Executive action under scrutiny here lies at precisely the opposite end of the spectrum. Congress has explicitly refused to authorize the use of seizure in the type of situation here presented. And rather than to take advantage of the emergency machinery provided by Congress in the Labor Management Relations Act—under which Congress and the Executive would operate smoothly within their respective spheres of responsibility—the Executive chose to follow a quite different and contrary course.

The inquiry remains whether any other law of the United States furnishes authority for the seizure of plaintiffs' properties. The only laws which authorize seizure of any production facilities by the President are Section 18 of the Universal Military Training and Service Act (62 Stat. 625; 50 U. S. C. A. App. §468) and Section 201 of the Defense Production Act of 1950, as amended (64 Stat. 799, 65 Stat. 132; 50 U. S. C. A. App. §2081). See Appendix, *infra*.

Mr. Sawyer's counsel in their memorandum in the District Court (p. 62), and again on oral argument (R. 371), freely admitted that the Executive Order and the action taken under it are not based on these or any other statutes. Even brief consideration of these two statutes demonstrates conclusively that no claim could be made to the contrary.

Section 18 of the *Universal Military Training and Service Act* provides that, upon the President's determination that it is in the interest of the national security to obtain prompt delivery of any articles or materials, the procure-

ment of which has been authorized by Congress exclusively for the use of the armed forces or the Atomic Energy Commission, the United States is authorized to place orders for such articles or materials. The order must specifically state that it is being placed pursuant to the provisions of the section. If the person with whom such an order is placed refuses or fails to fill it, the President is authorized to take immediate possession of that person's plant and to operate it for the production of such articles or materials as may be required by the United States. Plaintiffs have received no order placed pursuant to the provisions of this section.*

Section 201(a) of the *Defense Production Act of 1950*, as amended, not only is not applicable, but also demonstrates the policy of Congress against unrestricted seizure of real and personal private industrial property during even this time of urgent preparation for defense.

It authorizes the President to requisition only *personal* property, and then only (i) after a determination that the property is essential for the national defense and that all other means of obtaining its use have been exhausted, and (ii) upon fixing the value of the personal property requisitioned and payment of its value. The section specifically forbids the President to requisition real property.

Section 201(b) excludes executive seizure of real estate, by providing that, if its acquisition is necessary in the interest of national defense, the President is confined to the institution of regular condemnation proceedings in the courts.

* Uncontroverted sworn statements of the plaintiffs' executives disclose that this is true as to U. S. Steel (R. 83); Bethlehem (R. 119); Republic (R. 163); and Youngstown (R. 17). There is no contrary claim as to any of the other plaintiffs.

Moreover, in Title V of the Defense Production Act, Congress expressed its intent "that there be effective procedure for the settlement of labor disputes affecting the national defense." (Section 501.)^{*} The Act goes on to authorize mediation and conciliation facilities, and authorizes the President to initiate voluntary conferences between management, labor and representatives of the public. (Section 502.)^{*} Congress expressly provided, however, that in connection with labor disputes affecting national defense no action inconsistent with the provisions of the Labor Management Relations Act of 1947 or other applicable laws should be taken under Title V. (Section 503.)

The 1951 amendments to the Defense Production Act of 1950 are worth noting. That Act, prior to the 1951 amendments, authorized the President to requisition real estate as well as personal property. By the Amendment of July 31, 1951 (65 Stat. 132) the President's authority to requisition real estate was taken away, and he was given instead the much more limited authority merely to institute condemnation proceedings in the courts.**

The President has made no determination pursuant to any provisions of the Defense Production Act and has taken no action to acquire either real or personal property thereunder.

* The provisions of Title V have not thus far been implemented with respect to the settlement of labor disputes.

** That Congressional policy against seizure^o has steadily become more stringent is clear. With respect to the earlier and more drastic provisions (now eliminated), H. Rep. No. 2759, 81st Cong., 2d Sess. 4 (1950) said:

"The power to requisition is a drastic exercise of the sovereign power. The committee is desirous of reducing to the minimum the effect of requisitioning upon the public. Provisions have therefore been inserted, requiring that the authority cannot be exercised unless the President has been unable to obtain the property on fair and reasonable terms * * *"

We have, then, a situation where this seizure not only is unauthorized by any existing act of Congress but is flatly contrary to the procedures specifically laid down by Congress in every applicable statute for dealing with just the present situation.

D. The Seizure and Mr. Sawyer's Other Actions Cannot Be Justified Under the President's Power as Commander in Chief.

Paralleling the responsibility as Chief Executive for the execution of the laws passed by Congress is the President's military function as Commander in Chief of the Army and Navy. The Constitutional Convention, with the grievances of the colonies against the English King and his generals firmly in mind, conferred upon the President the limited function of direction of military operations. As stated in the *Federalist*, No. 69:

"In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces * * * ; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies, —all which, by the Constitution under consideration, would appertain to the legislature." *

* Several of the "war powers" which the Constitution entrusted specifically to Congress and not to the President were, by contemporary practice, still claimed and exercised by the British Crown as Commander in Chief. Thus, according to Blackstone it was the King and not the Parliament which had power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water. Likewise according to Blackstone, it was still a part of the Crown's prerogative to organize and arm the militia, to make rules for the government and regulation of the land and naval forces, and possibly even to raise armies. Even the power of compulsory military service (in the form of impressment of seamen, particularly distasteful, by

As we have seen, the power to enact laws relating to the defense of the nation, the prosecution of war, and the support of the armed forces, was specifically placed in Congress under Art. I, sec. 8 of the Constitution. The President's power is purely military in nature and is directly related to the direction of the armed forces. Laws relating to the conduct of war and the maintenance of our defenses are within the sole domain of Congress. As was said in *U. S. v. Bethlehem Steel Corp.*, 315 U. S. 289, 309 (1942), "if the Executive is in need of additional laws by which to protect the nation against war profiteering, the Constitution has given to Congress, not to this Court, the power to make them." See also *Lichter v. United States*, 334 U. S. 742, 765-766 (1948); *Ex parte Quirin*, 317 U. S. 1, 26 (1942); *O'Neal v. United States*, 140 F. 2d 908, 911 (6th Cir. 1944), *cert. denied*, 322 U. S. 729 (1944). As the Court said in the *O'Neal* case, in pointing out that such powers as the right to allocate defense materials and facilities and to establish rationing are legislative rather than executive:

"While the war power in this country is conferred on the Congress and on the President, *Kiyoski Hirabayashi v. United States*, 320 U. S. 81, 93, 63 S. Ct. 1375, 87 L. Ed. 1774, the principal war power of the President arises as Commander-in-Chief of the Army and Navy and does not include any war power legislative in its nature . . . Such drastic power [to allocate, ration, etc.] necessarily falls within the 'legislative power' with which the Congress is invested

actual experience, to the American colonists) was declared by Blackstone to be in the King independent of Parliamentary authority. See, generally, Blackstone's Commentaries, Book 1, Chapters 7 and 13. It is noteworthy that all of these powers, regarded as part of the executive prerogative in England, were specifically transferred in the Constitution to the legislative branch.

See also Story, *The Constitution*, § 1492 (Cooley's Ed. 1873).

(Art. I, Section 1, U. S. Constitution)." (140 F. 2d at 911.)*

The limits on the power of the President as Commander in Chief have been clearly delineated by this Court. It has long been settled that under this authority, which is strictly military in character, the President has the power to control civilian activity only where the emergency is so imminent and the threat of military danger to the nation so pressing that the slightest delay would lead to disaster; and even then his action is subject to court review. *Fleming v. Page*, 9 How. 603, 615 (1850); *Mitchell v. Harmony*, 13 How. 115 (1851); *Ex parte Milligan*, 4 Wall. 2 (1866); *United States v. Russell*, 13 Wall. 623 (1871); *Sterling v. Constantin*, 287 U. S. 378, 400-401 (1932).

In *Mitchell v. Harmony*, *supra*, where it was held that the President's war power did not justify the seizure of plaintiff's property,** this Court placed the following

* See also 2 Tucker, The Constitution 716 where it is said *inter alia*:

"The Commander in Chief is subordinate to Congress in all respects, and he cannot use his military power to the injury of the country, except with the concurrence and consent of Congress."

Compare *Madsen v. Kinsella*, No. 411, October Term, 1951, decided April 28, 1952, dealing with the power of the President as Commander in Chief to provide for trial by military courts in occupied areas, where Congress had not deprived such courts of existing jurisdiction which they possessed on August 29, 1916, when Congress revised the Articles of War. But see also *Ex Parte Milligan*, 4 Wall. 2 (1866).

** *Harmony* was a private trader who accompanied an American Expeditionary Force into Mexico during the Mexican War with a wagon train of goods. After progressing some distance into enemy territory, Harmony tried to return, whereupon the appellant, Colonel Mitchell, compelled him to remain with the troops and used his wagon train for military service. Subsequently the American Army retreated and the wagon train was captured by the Mexicans. Harmony sued Colonel Mitchell for substantial damages, and the award of damages by the jury was affirmed by this Court.

limitation on the exercise of the Presidential power as Commander in Chief:

"There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use * * *

"But we are clearly of opinion, that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. * * *

"Our duty is to determine under what circumstances private property may be taken from the owner by a military officer in a time of war. And the question here is, whether the law permits it to be taken to insure the success of any enterprise against a public enemy which the commanding officer may deem it advisable to undertake. And we think it very clear that the law does not permit it." (13 How. at 134-135.)

This stringent requirement for the exercise of military power over civilian activity and civilian property was re-emphasized in *United States v. Russell*, 13 Wall. 623 (1871) where this Court again made it apparent that extreme public danger, making recourse to normal governmental processes impossible, must be established. There the Court said:

"Extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity

in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized and appropriated to the public use, or may even be destroyed without the consent of the owner. * * * Where such an extraordinary and unforeseen emergency occurs in the public service in time of war no doubt is entertained that the power of the government is ample to supply for the moment the public wants in that way to the extent of the immediate public exigency, but the public danger must be immediate, imminent, and impending, and the emergency in the public service must be extreme and imperative, and such as will not admit of delay or a resort to any other source of supply, and the circumstances must be such as imperatively require the exercise of that extreme power in respect to the particular property so impressed, appropriated, or destroyed. Exigencies of the kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified." (13 Wall. at 627-628.)

Moreover, the power as Commander in Chief, being strictly military in character, is designed for exercise only within the theatre of war. See *Mitchell v. Harmony*, 13 How. 115 (1851); *Ex parte Milligan*, 4 Wall. 2 (1866). Indicative of the proper scope of the power is the sustaining by the courts of such action as destruction, by military commanders in the field, of railroad bridges during a war (*United States v. Pacific R. R.*, 120 U. S. 227 (1887)) and the seizure, when confronted with armed rebellion, of neutral vessels running a blockade (*Prize*

Cases, 2 Black 635 (1862).* The nationwide properties of the steel industry situated throughout the continental United States and seized indiscriminately regardless of what proportion or type of products were designed for military use, certainly cannot be characterized as being within a theatre of military operations.**

Although the Presidential power as Commander in Chief justifies the taking or destruction of property when the stringent requirements for its exercise are present, it does not encompass the function of eminent domain. When, as in the present situation, there is no foundation for interference with private property under the President's military power, any taking of property must be made under the Congressional power of eminent domain. Taking of property for public use is a power of the legislature; the right of the executive department to take property by eminent domain must be based on Congressional authorization. "The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government." *Hoe v. United States*, 218 U. S. 322, 336 (1910). See, also,

* Significant factors in the *Prize Cases*, in addition to the armed rebellion, were that President Lincoln was acting not only as Commander in Chief but also under the express authority of an early statute authorizing him to use armed force to suppress insurrection, and that Congress had passed legislation specifically ratifying the declaration of the blockade.

** Cf. *United States v. Montgomery Ward & Co.*, 58 F. Supp. 408 (N. D. Ill. 1945) (holding seizure of Ward plants not justified under President's power as Commander in Chief since plants outside the "theatre of war"), reversed on ground that the seizure was justified under section 3 of the War Labor Disputes Act, 150 F. 2d 369 (7th Cir. 1945), *dismissed as moot*, 326 U. S. 690 (1945). It is recognized that, under certain circumstances, the continental United States may be considered within the theatre of war. Cf. *Ex Parte Quirin*, 317 U. S. 1 (1942) (trial by military tribunal of saboteurs clearly members of foreign army engaged in acts of war on United States soil).

United States v. North American Transportation & Trading Co., 253 U. S. 330, 333 (1920); *United States v. Rauers*, 70 Fed. 748 (S. D. Ga. 1895); *Rindge Co. v. Los Angeles*, 262 U. S. 700, 709 (1923); *Bragg v. Weaver*, 251 U. S. 57, 58 (1919); *Chappell v. United States*, 160 U. S. 499, 510 (1896).*

Moreover, although it is settled law that upon the breaking out of war enemy property found within our territory is subject to seizure and confiscation, it has been consistently held that this power can be exercised only by or under the direction of Congress, and that the Executive has no inherent power to make or order such seizures without Congressional legislation. *Brown v. United States*, 8 Cranch 110, 129 (1814) in which this Court said:

"It appears to the Court, that the power of confiscating enemy property is in the legislature, and that the legislature has not yet declared its will to confiscate property which was within our territory at the declaration of war." **

The very nature of the President's military power as Commander in Chief requires that its use be restricted to those instances of immediate public danger which can-

* The principle that eminent domain may be exercised only pursuant to act of Congress is so long and thoroughly established that in recent years the principal inquiry by the courts has been limited to whether the "taking" was within the scope of congressional authority. See, e.g., *United States v. Carmack*, 329 U. S. 230 (1946); *United States ex rel. T. V. A. v. Welch*, 327 U. S. 546 (1946); *United States v. Threlkeld*, 72 F. 2d 464 (10th Cir. 1934), cert. denied, 293 U. S. 620 (1934); *United States v. West Virginia Power Co.*, 122 F. 2d 733 (4th Cir. 1941), cert. denied, 314 U. S. 683 (1941).

** To the same effect see *Britton v. Butler*, 4 Fed. Cas. 177, 180 (C. C. S. D. N. Y. 1872), in which it was held, citing *Brown v. United States*:

"Under the constitution of the United States the power of confiscating enemy property and debts due to an enemy is in congress alone."

not be handled by normal governmental action. In *United States v. McFarland*, 15 F. 2d 823 (4th Cir. 1926), *cert. granted*, 273 U. S. 688 (1927), *cert. revoked*, 275 U. S. 485 (1927), the Court emphasized the salutary standard as to "how careful the courts are to restrict the exercise of this power [the President's power as Commander in Chief] within narrow bounds." (15 F. 2d at 826.)

In the case at bar there is no longer a state of war remaining from World War II. The Treaty of Peace with Japan, to which the Senate gave its advice and consent on March 20, 1952, was ratified by the President on April 15th, and formally took effect after the ministerial act of depositing such ratification with the Department of State on April 28. In fact Mr. Sawyer's counsel both in their memorandum in the District Court (p. 58) and on oral argument (R. 371) expressly disclaimed any idea of justifying the seizure on any claim of a technical state of war remaining from World War II.

The preamble clauses of Executive Order No. 10340 refer to the hostilities in Korea and "our national defense and the defense of those joined with us in resisting aggression" (R. 7). There should be no need to say that plaintiffs have no argument with the fact that our nation must take steps necessary to resist aggression. The inescapable fact remains that the Constitution and our form of government do not visualize this problem being met, in the present situation, under the President's power as Commander in Chief.

In January, 1951, the President, in his message on the State of the Union* placed major emphasis on the threat of aggression and the need to present a strong national defense. The Korean hostilities have continued for close to two years. It is clear beyond argument that the present

* H. R. Doc. No. 1, 82nd Cong., 1st Sess. (1951).

controversy does not present a situation of a sudden emergency.

The affidavits submitted in opposition to the applications for injunctive relief (R. 27-62) are themselves the most eloquent testimony that the present controversy can, by no stretch of the imagination, be said to involve the sudden and imminent threat of military disaster which justifies the exercise of presidential power as Commander in Chief. Those affidavits clearly reveal that what is involved here is a problem of more than two years' standing. The problem of securing necessary steel for military equipment, for the production of civilian vehicles and other transport facilities, for Atomic Energy Commission construction programs and for petroleum industry expansion is a broad and continuing question within the province of Congress. And Congress has shown no hesitation or reluctance to legislate in this area whenever particular authority was desirable. As for the basic question of the relation of labor disputes to the supply of vital materials and other aspects of our defense effort, we have seen that this question—which is necessarily a continuing one in any period of national stress—has been with us, and received extensive consideration, as long ago as 1947.

Patently, these continuing problems, which have been in existence for periods ranging from a minimum of several months to a number of years, present no basis for any sudden exercise of the military power of the President as Commander in Chief. Any contention that Mr. Sawyer's seizure and other action can be based on the President's military power is based on a completely indefensible perversion of that authority as provided in the Constitution and delineated by the courts.

The "war powers" of the United States are those of Congress and the President, not those of the President

alone. It is for Congress, and not for the President, "to raise and support Armies", and for the President to direct them. Under the President's power as Commander in Chief, as the courts have uniformly held, property can be seized or destroyed only in the course of battle in order that our arms may prevail. This is a far cry from a contention that the power extends in any way to a continuing domestic problem involving a major aspect of our economy. The present controversy does not present a problem arising in a campaign in the field. It is a question of broad legislative import which must be—and has been—dealt with by Congress.

Constitutional guarantees would be meaningless if the President, after ignoring the procedures provided by Congress and after failing to request Congress for authority to take other action which he might deem desirable, could then claim the existence of an emergency justifying seizure of an entire industry.

Above all, there can be found no basis in the Executive's military power for any action by Mr. Sawyer with respect to the terms and conditions of employment of plaintiffs' employees. Entirely aside from the absence of power for defendant's seizure of plaintiffs' properties, there clearly can be no basis in the President's power as Commander in Chief for placing in effect, in accordance with the announced and repeated threats of Mr. Sawyer, wage increases and other changes in terms and conditions of employment, or for the forcible appropriation of plaintiffs' funds to carry out those changes.

E. The Seizure Cannot be Justified by Any Claim of an "Aggregate of Powers" or by Isolated Instances of Past Executive Action Which Were Never Legally Challenged.

At the argument before Judge Pine Mr. Sawyer's counsel argued squarely that the President had both an unreviewable discretion to decide whether an emergency existed and an unlimited power to deal with it (*cf. supra*, pp. 27-29). In his concluding statement the following colloquy occurred:

"The Court: Well, we have had crises before in this country, and we have had governmental machinery that was adequate to cope with it.

You are arguing for expediency. Isn't that it?

Mr. Baldrige: Well, you might call it that if you like. *But we say it is expediency backed by power*" (R. 420).

Although counsel in their petition for certiorari now expressly repudiate this appalling claim (the assertion of which fully justified the strong language of Judge Pine's opinion), their basic argument remains unchanged.

Despite the fact that the memorandum filed on behalf of Mr. Sawyer in the District Court, and his petition for certiorari here, pay lip service to the requirement that the President's power must be found somewhere in the Constitution, the argument below proceeded specifically, and the argument here proceeds by necessary implication, upon the nebulous theory of a "broad residuum of powers" in the President and of his "aggregate" of powers.

In essential analysis, this theory boils down to a claim that executive action which is not authorized under any specific provision of the Constitution or any law of the United States, and is indeed inconsistent with every specific existing statute, somehow achieves validity when all provi-

sions of the Constitution and statutes are considered together.

We respectfully submit that the Executive Order and action purportedly taken thereunder, being without authority under any constitutional or statutory provision, cannot be validated by the application of labels such as "broad residuum" or "aggregate" of powers.

Closely related to the foregoing contention is the suggestion that the Executive Order and Mr. Sawyer's action are justified by various instances in which Presidents in the past have apparently acted without constitutional or legislative authority. For example, the memorandum in the District Court lists 12 properties seized by President Roosevelt prior to the passage of the War Labor Disputes Act under his purported powers as President. For a variety of reasons, the lawfulness of none of these seizures was ever put to judicial test.

It must also be emphasized that, despite the extended parade of citations presented in the opposing memorandum below, there is no judicial authority supporting the actions here attacked. It would unduly extend this brief to consider individually every case advanced. Brief consideration of a few random examples, however, demonstrates the complete lack of precedent or support for the present action.

1. Counsel referred below (see p. 57 of their Memorandum) to *United States v. Pewee Coal Co., Inc.*, 341 U. S. 114 (1951), as confirming the existence of a constitutional power in the President to seize property during a national emergency. This assertion was made in the face of the incontrovertible fact that the legality of the taking—i.e., the question of the power of the Executive to seize the property—was not an issue in the case, as specifically stated by the Court of Claims. See *Pewee Coal Co. v. United States*,

88 F. Supp. 426, 430 (Ct. Cls. 1950). The briefs of both parties in the *Pewee* case were in complete agreement that the legality of the seizure was not in issue;* and on the argument before Judge Pine Mr. Sawyer's counsel so conceded (p. 184).

2. The cases cited involving seizures of facilities during wartime (e.g., *Ken-rad Tube and Lamp Corp. v. Badeau*, 55 F. Supp. 193 (W. D. Ky. 1944)), although presented as justification for inherent executive power to take property, actually involved seizures made under the specific authority of the War Labor Disputes Act, as Judge Pine pointed out (R. 71).

3. Counsel now assert (petition for certiorari in No. 745) that the principles embodied in the decision below, if contemporaneously applied, would have gone so far as to prevent President Jefferson from making the Louisiana Purchase and President Lincoln from issuing the Emancipation Proclamation. This is sheer nonsense.

All that President Jefferson did was to negotiate a treaty on April 30, 1803 (8 Stat. 208) with the Government of France. That treaty under accepted constitutional principles did nothing more than give the President an option to buy Louisiana, subject to ratification by the Senate and

* The brief of the United States (Docket No. 168, October Term 1950) stated at page 10:

"Neither party has challenged the validity of these particular actions, the Executive Order, or the Secretary's general action under the Order."

And again in the same brief at page 89:

"In both cases, the administrative regulations have not been challenged by either party, and their validity is not in dispute. * * * In these circumstances, it is both procedurally proper and substantively just to make the same assumption in this Court, * * *"

And see also Pewee's brief on the merits, p. 36.

to the appropriation of the purchase price by both Houses. The conditions of the option were duly fulfilled. The Senate ratified the treaty on October 20, 1803.* On October 31, 1803, both Houses authorized the President to occupy the Louisiana territory pursuant to the treaty; and ten days later they appropriated the necessary sums for payment (2 Stat. 245-265).

The Emancipation Proclamation (12 Stat. 1267, 1268) was purely a war measure, *flagrante bello*. It recited that it was to operate solely against enemy property in Confederate territory. The Supplemental Proclamation of January 1, 1863 (12 Stat. 1268), by which the original Proclamation was put into effect, specifically excepted all of Tennessee and West Virginia as well as the portions of Louisiana and Virginia then occupied by Federal troops. Slaves in those areas, as well as in the border States (Kentucky, Delaware, Maryland and Missouri), did not receive their legal freedom until the Thirteenth Amendment. The Proclamation of January 1, 1863 recited that it was "a fit and necessary war measure for suppressing said rebellion" (12 Stat. 1268). Constitutionally, it was no different from Sherman's destruction of property in enemy territory on his march to the sea.

4. In their petition for certiorari Mr. Sawyer's counsel cite among the "precedents" of Executive action "the seizure by President Lincoln during the Civil War of the railroads and telegraph lines between Washington and Annapolis". This seizure, again, was made *flagrante bello* at a time in early 1861 when the area in question was actually in the theatre of hostilities and the capital itself was in danger of being isolated. Congress subsequently passed a statute which in effect ratified this seizure and specifically gave the President control of all railroads and

* 2 Miller, Treaties, etc. of the United States 506.

telegraph lines. The Act in terms provided that it was to remain in force only so long as was "necessary for the suppression of this rebellion." (Act of Jan. 31, 1862, c. 15; 12 Stat. 334.)

5. Mr. Sawyer's counsel below, citing from Corwin's *The President: Office and Powers*, p. 190, finds support for his action in President Theodore Roosevelt's "stewardship theory" as exemplified by his consideration of the possible seizure of coal mines during a strike to prevent a coal shortage. Counsel neglected to point out, however, that Corwin in the very next paragraph of his study had this to add:

"One fact 'T.R.' omits to mention, and that is that Attorney General Knox advised him that his 'intended' step would be illegal and unconstitutional. For some reason the opinion is still buried among similar arcana of the Department of Justice" (p. 191).

Past executive acts of doubtful validity can furnish no support for sustaining the Executive Order and defendant's past and threatened actions. As a recent commentator observed:

"Acts based on this law of necessity and assumed probability of excuse or of subsequent ratification do not pretend to be supported by constitutional authority and are, of course, of no value as precedents establishing the existence of constitutional power." Whyte, *The War Powers of the President*, [1943] Wis. L. Rev. 205, 211-212.

There could be no more dangerous principle—nor one more foreign to the Constitution—than a rule that past illegality can through some legerdemain serve as authority to legalize present illegality.

Indeed, if Executive construction is to be accorded any validity, a most recent example is directly in our favor. During the coal strike of 1950 the President invoked the Labor Management Relations Act; and on March 3, 1950, he sent a message to Congress reciting the steps taken and specifically requesting Congressional authorization for the seizure of the coal mines.*

Mr. Sawyer's counsel now claim that the President has, and has always had, an "inherent power" to effect seizures. In their memorandum before Judge Pine (p. 60-A) they went so far as to assert that this "inherent power" could not be diminished or limited by Congress. The fact that the present Chief Executive, in an almost identical recent situation, thought it necessary to ask Congressional authorization for seizure seems clearly inconsistent with the existence of any such "inherent power".

F. Mr. Sawyer's Action Violates the Fifth Amendment to the Constitution.

In view of the complete lack of authority under the Constitution and laws of the United States for Mr. Sawyer's action, it is clear that the seizure and other interference with plaintiffs' property and rights deprive them of due

* The message appears in 96 Cong. Rec. 2774-2775 (1950). It concludes with these words:

"The coal industry is a sick industry. Temporary seizure by the Government, though it may be necessary under present circumstances, cannot produce a cure. *I am recommending seizure authority because I believe we now have no alternative.* But I urge that it be accompanied by a positive and constructive effort to get at the root of the trouble. This is in the interest of the men who work the mines. It is equally in the interest of their employers. Above all, it is in the interest of the American people.

I urge the Congress, therefore, to act immediately on legislation to authorize the Government to take possession of and operate the mines, and then to turn its attention to legislation looking toward a solution of the basic difficulties of the coal industry."

process in violation of the Fifth Amendment. But even if it were to be assumed that the Executive could under some circumstances authorize action of the kind here challenged, despite the utter lack of statutory basis, the seizure and other action necessarily contravene the due process clause.

The argument advanced on behalf of Mr. Sawyer ignores the guaranty of the Fifth Amendment that no person shall be deprived of property without due process of law. The seizure of property by Executive fiat, leaving the plaintiffs literally at the mercy of Mr. Sawyer's discretion, is completely incompatible with that requirement (Cf. *Yick Wo v. Hopkins*, 118 U. S. 356, 369-370 (1886)), which, as this Court has said, embraces the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions". *Hebert v. Louisiana Co.*, 272 U. S. 312, 316 (1926). Moreover, the due process clause and the just compensation provision of the Fifth Amendment are not alternatives. Unless both are satisfied, the taking under purported governmental authority is unconstitutional. Cf. *Catlin v. United States*, 324 U. S. 229, 241 (1945):

Furthermore, there are readily available other and far less drastic means for dealing with the problem posed by the controversy between the plaintiffs and the Union—means which carefully safeguard the rights of both sides to the controversy, encourage maximum possible resort to the processes of collective bargaining, and permit the ultimate and extreme action, in the event of an impasse, only after the considered and deliberate participation of both the Executive and the Legislative Branch. It is apparent that these methods for dealing with the problem are designed to protect all interests—those of the nation and those of all parties—and to minimize the disruption of private rights to the extent most feasible in the particular circumstances of a particular emergency. With these alternative

means readily available, the choice by the Executive of the drastic and inherently arbitrary course selected in this case violates the Fifth Amendment. Compare *Dean Milk Co. v. Madison*, 340 U. S. 349, 354-355 (1951); *Weaver v. Palmer Brothers Co.*, 270 U. S. 402 (1926).

G. Denial of the Sweeping Executive Power Here Claimed Will Not Leave the Government Powerless to Meet an Emergency.

Negation of the sweep of executive power which is here claimed for Mr. Sawyer's actions would not result in a sterile construction of the Constitution or leave the Government powerless to deal with emergencies within the framework of the Constitution. It is true that the Constitution is a dynamic and continuously operative charter of government which is capable of meeting the varying demands of our society; but it does not follow from that that the executive action here challenged must be recognized as valid. The executive is not the only branch of the Government which is concerned in the matter. As the District Court stated, in pointing out the role of Congress:

" . . . our procedures under the Constitution can stand the stress and strains of an emergency today as they have in the past, and are adequate to meet the test of emergency and crisis." (R. 75)

The idea of a strong and unreviewable executive power, easily available to deal with real or imagined emergencies as deemed expedient, has a deceptive simplicity and certainty which should not lull us, as it has other nations,*

* Article 48 of the late Weimar Constitution in Germany provided that in an emergency the President could "take any measures necessary to restore public safety and order". It was by the use of this provision, following the Reichstag fire in 1933, that Hitler established the legal basis for his dictatorship. Roetter: *Impact of Nazi Law*, [1945] *Wisc. L. Rev.* 516; Lowenstein, *The German Constitution, 1933-1937*, 4 *Univ. of Chi. L. Rev.* 537, 539 (1937).

into forgetting that it is alien to our fundamental concept of a government of laws and not of men, or blind us to the fact that the Constitution created a government of limited powers, consisting of those powers expressly granted and those reasonably to be implied therefrom, all other powers being reserved to the people or to the States by the Ninth and Tenth Amendments. Cf. *McCulloch v. Maryland*, 4 Wheat. 316, 420 (1819); *Dorr v. United States*, 195 U. S. 138, 140 (1904); *Graves v. N. Y. ex rel. O'Keefe*, 306 U. S. 466, 477 (1939).

As Chief Justice Hughes said for this Court in *Home Bldg. & L. Assn. v. Blaisdell*, 290 U. S. 398, 425-426 (1934):

"Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.

"While emergency does not create power, emergency may furnish the occasion for the exercise of power. 'Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.' *Wilson v. New*, 243 U. S. 332, 348. The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. Thus, the war power of the

Federal Government is not created by the emergency of war; but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties. * * * *

⁵ See *Ex Parte Milligan*, 4 Wall. 2, 120-127; *United States v. Russell*, 13 Wall. 623, 627; *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 155; *United States v. Cohen Grocery Co.*, 255 U. S. 81, 88."

In accordance with the views thus expressed, this Court has not hesitated on various occasions to consider the sufficiency of circumstances on the basis of which drastic executive action was assertedly taken; even where that action was supported by statute. See, e.g., *Hirabayashi v. United States*, 320 U. S. 81, 91-95, 101-102 (1943); *Ex Parte Quirin*, 317 U. S. 1, 24-25, 29 (1942). See also *Ex Parte Milligan*, 4 Wall. 2, 120-122, 124-127 (1866); cf. *Mitchell v. Harmony*, 13 How. 115, 133-135 (1851). Accordingly there is clearly no merit to the contention advanced in the memorandum for Mr. Sawyer in the District Court, at pages 19-22 and 59, that the nature of the "emergency" is not subject to judicial review.

What is the emergency which is here claimed? It is that stoppage of steel production, as the result of a labor dispute, would be catastrophic to the civilian economy and the military needs of the nation. No one denies that such a stoppage, if continued for any substantial time, would have disastrous consequences. That in substance is all that the Executive Order and the affidavits in opposition assert (R. 6-9, 27-62). Nowhere in those affidavits is there

any intimation that the challenged seizure is the only way, or even that it is the way, in which to avoid the stoppage of steel production. The Executive Order states merely that it is necessary to take possession of and operate the properties of plaintiffs to assure the continued availability of steel.

Moreover, the claimed emergency did not arise suddenly, or over night. The threat to continued steel production posed by the labor dispute between plaintiffs and the Union had been clear even before the contracts expired on December 31, 1951.

When the foregoing characteristics of the claimed emergency are laid along side of the tools which Congress has provided to deal with such a situation—namely the Labor

* Typical examples are the following statements from the affidavit of the Secretary of Defense (R. 29, 31):

"The cessation of production of steel for any prolonged period of time would be catastrophic.

* * * * *

"A work stoppage in the steel industry will result immediately in serious curtailment of production of essential weapons and munitions of all kinds; if permitted to continue, it would weaken the defense effort in all critical areas and would imperil the safety of our fighting men and that of the Nation."

Similarly, the affidavit of the Administrator of the Defense Production Administration states (R. 34):

"The continued production and fabrication of steel and the elements thereof is necessary to the national defense."

The affidavit of the Administrator of the National Production Authority is somewhat more detailed but even it states (R. 36):

" * * * Information is not presently available to indicate the particular shapes and forms of steel products and the particular steel alloys the production of which would not be interrupted by said work stoppage. The statements as to the disruptive effects of the stoppage as set forth below are subject to the qualification that they would be alleviated to the extent that the productive capacity of the operating iron and steel mills could be used to meet the requirements of a particular program."

Management Relations Act of 1947, the seizure provisions of Section 18 of the Universal Military Training and Service Act, and the requisitioning authority conferred by Section 201 of the Defense Production Act of 1950, as amended—and are tested against the principle that emergency does not create power, we submit that there can be only one answer—that Mr. Sawyer's actions are wholly without warrant of law. Any other conclusion would have the most ominous implications for our constitutional system and for the rights which it protects.*

This conclusion of course does not mean that the Government is powerless to deal with the threat to steel production which arises from the current labor dispute. As stated above, the Executive has been provided with various means by Congress for dealing with the matter. And, if those means should not prove adequate—which cannot be said to be the case when they have not even been tried—Congress can legislate appropriately and specifically to protect the nation from threatened disaster. As the District Court stated (R. 175), there is no reason to believe that Congress would fail in that regard.

* We do not argue that when the Executive has a choice of constitutional alternatives for dealing with a situation the courts may review the wisdom or control the discretion involved in that choice. We do say, however, that the Executive is never free to resort to an unconstitutional procedure, and this Court has the duty and the power to determine whether the procedure taken is constitutional.

POINT III

The seizure and Mr. Sawyer's threatened action are causing and will cause the plaintiffs irreparable injury for which they have no adequate remedy at law.

A. The seizure is causing serious injury to the plaintiffs and further grave injury is immediately threatened.

Mr. Sawyer's seizure of the properties and business of the plaintiffs at once caused a most serious injury to plaintiffs. While plaintiffs' own executive personnel were not displaced from office—but were told to run their properties subject to Mr. Sawyer's orders—it at once became impossible for plaintiffs to continue to run those properties in a normal way. There are few if any businesses as complex as steel, as demanding upon the managerial judgment of executives, as dependent upon meshing each day's decisions with plans for the morrow. The seizure leaves the managers of the plants in an ambiguous position and the several boards of directors in a quandary. Mr. Sawyer has already set up a comprehensive governmental machinery, so organized as to enable him to coordinate and control the entire steel industry.* Any present assurance from Mr. Sawyer of "business as usual" is qualified by a reservation of his power to issue any orders he may see fit on any phase of the business at any time. Management can act only from day to day in accordance with tentative decisions, hedged always against the possibility that they cannot be carried through, or that the assumptions of future events on which they are based will be upset by some supervening edict of Mr. Sawyer.

An example of the impossible position in which plaintiffs find themselves is revealed by the situation of the United

* See Department of Commerce Order 140, quoted in Stephens affidavit (R. 100-101).

States Steel Company, with a huge new steel plant, The Fairless Works, less than half completed (R. 97-98). Decisions affecting investment and operations must be made every day. A seizure which leaves the owners and managers in a morass of uncertainty and exposed at any moment to forced revision or revocation of any decision they may make, is a far more immediate and grievous injury than many types of damage, such as clouds on title, which have always moved courts of equity.

In any case, there is immediately in prospect, save for this Court's protection, an order by Mr. Sawyer under the purported authority of paragraph 3 of Executive Order 10340 (R. 8) which will alter the terms and conditions of employment prevailing in the plaintiffs' plants (R. 103, 126, 141). The President himself had announced, just before this Court ordered otherwise, that such action would be taken, and taken at once, unless the plaintiffs and the Union came to an agreement (*supra*, p. 14).

If that action were to adopt the recommendations made by the Wage Stabilization Board it would involve hundreds of millions of dollars of additional employment costs annually, to be paid out of the private funds of the plaintiffs to hundreds of thousands of employees.* Precisely what Mr. Sawyer would do if the present injunctive protection were removed, the plaintiffs cannot tell (R. 105). But it is of no great significance whether he would impose the recommendations of the Wage Stabilization Board in whole or only in part. In any case injury, and serious injury, there would be, for he himself has stated that there would certainly be wage increases (R. 103); and the entire focus of Mr. Sawyer and of those acting with him since the seizure has been upon the grant of concessions to the Union.

* See footnote, p. 7, *supra*.

Moreover the Wage Stabilization Board recommended—and it would be open to Mr. Sawyer to impose—the union shop (R. 94, 104, 125) which not only would drastically affect the plaintiffs' labor costs but would alter the pattern of employer-employee relations in a manner which could never be undone. In *American Federation of Labor v. Watson*, 327 U. S. 582, 593-595 (1946), this Court asserted that impairment of collective labor relationships by governmental outlawry of the closed shop is in itself an irreparable injury warranting the interposition of a court of equity. The principle of that decision is applicable here.

Finally, but certainly not of least importance, consummation of Mr. Sawyer's threat to alter the terms and conditions of employment would most gravely damage the plaintiffs in their bargaining position with the Union.

There is a far reaching controversy between the plaintiffs and the Union in connection with the formulation of a new and comprehensive collective bargaining agreement. Over 100 issues are in dispute between the parties (R. 103, 160). Extensive as were the recommendations of the Wage Stabilization Board, even they did not deal with all the issues. It is a basic principle of labor negotiations that all outstanding issues be resolved together (R. 104, 161). In the present case outstanding unresolved issues of vital concern to management include those having a direct effect upon the efficiency of operation (R. 103-104, 160).

Whatever may be the order which Mr. Sawyer is even now prepared to issue—whether it be the full Wage Stabilization Board recommendations, or something less (R. 103, 142)—the result will be to create a new and higher floor for the Union in its continued and future negotiations with the plaintiffs. The Union has already made that abundantly clear to this Court in its *amicus* brief filed in connection with the petitions for certiorari. There, at pp. 5-6,

the Union said that, "when the mills are restored to their [the plaintiffs'] possession they will have the right and it will again be their duty to bargain with the Union concerning *the then current* wages and working conditions."

As a practical matter, once new terms and conditions are prescribed, it would be impossible to turn back the clock and ever to negotiate from the respective positions of the parties as they now are. Government-imposed terms and conditions always have their consequences beyond the period of a government seizure. That is why the War Labor Board, under the War Labor Disputes Act, made it a practice to consult with the owners of a plant when passing upon proposals of a government agency for a change in working conditions, for the Board recognized "the likelihood that the period of governmental operation may be short and the effect of the changes may last beyond this period." *Opinion of the General Counsel of the War Labor Board*, 15 L. R. R. Man. 2578 (1944).

Moreover, as the affidavit of R. E. McMath shows (R. 126), the owners of coal mines seized in 1946 under the War Labor Disputes Act were required to assume the so-called Krug-Lewis Agreement as a condition to the return of their properties. And it must be recognized that it may be argued that, once the seizure is ended, the steel companies would not have the right under the National Labor Relations Act unilaterally to restore the terms and conditions of employment which existed prior to the seizure without first exhausting the collective bargaining process. *National Labor Relations Board v. Crompton-Highland Mills, Inc.*, 337 U. S. 217, 224-225 (1949); *American National Insurance Co. v. National Labor Relations Board*, 187 F. 2d 307, 309 (5th Cir. 1951), *cert. granted*, 342 U. S. 809 (1951); *Tower Hosiery Mills*, 81 N. L. R. B. 658 (1949).

Consequently, Mr. Sawyer's threatened action would be injurious to plaintiffs not only in the immediate dollars and

cents damage consequent upon increased wages but also in the weakening of the plaintiffs' bargaining position today with respect to all the unresolved issues in the labor dispute with the Union and—of equal or even greater importance—in the weakening of the plaintiffs' bargaining position at all times in the future with respect to any and all issues which will be faced at the end of the seizure period and thereafter. *American Federation of Labor v. Watson*, 327 U. S. 582 (1946); cf. *Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522 (1923).

B. Money damages—assuming they could be recovered—would be wholly inadequate.

A simple cloud on title has always moved equity to grant relief because no other remedy is complete or adequate. *Wickliffe v. Owings*, 17 How. 47, 50 (1854); *Southern Pacific v. United States*, 200 U. S. 341, 352 (1906); *Ohio Tax Cases*, 232 U. S. 576, 587 (1914); *Shaffer v. Carter*, 252 U. S. 37, 48 (1920). The seizure of the properties and business of the plaintiffs, with its host of uncertainties and legal and practical problems arising from the ambiguous position in which the owners are left, should appeal to equity at least as strongly as a cloud on title. In these circumstances, any remedy at law would necessarily be inadequate. See *Osborne & Company v. Missouri Pacific Railway Company*, 147 U. S. 248, 258 (1893); *Land v. Dollar*, 330 U. S. 731, 738 (1947); cf. *Truax v. Raich*, 239 U. S. 33, 38 (1915); *International News Service v. Associated Press*, 248 U. S. 215, 236-237 (1918); *Terrace v. Thompson*, 263 U. S. 197, 214-215 (1923); *Pierce v. Society of Sisters*, 268 U. S. 510, 534-536 (1925); see also *Bell v. Hood*, 327 U. S. 678, 684 (1946).

Even if plaintiffs were to sue at law for damages, and the suit were to be entertained, the problem of proof of damages would be severe. The diversity of opinion in

United States v. Pewee Coal Company, 341 U. S. 114 (1951), suggests the problem. On one theory or another, it might be necessary to speculate as to the course of events that would have occurred had there been no seizure: Would there have been a strike of any significant duration? Would there have been a change in employment conditions in connection with the settlement of such a strike? The need to wrestle with such questions, and the speculation to which they lead, have always been thought by equity to warrant its interposition. A prospective suit for damages which can be proved only by such a process is not an adequate remedy. *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 322 (1936); *Kessler v. Eldred*, 206 U. S. 285, 290 (1907); *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 11-12 (1898); *Roof v. Conway*, 133 F. 2d 819, 826-827 (6th Cir. 1943); *Texas Co. v. Central Fuel Oil Co.*, 194 Fed. 1, 11 (8th Cir. 1912); *Fraser v. Geist*, 1 F. R. D. 267, 269 (E. D. Pa. 1940); *Luckenbach S. S. Co. v. Norton*, 21 F. Supp. 707, 709 (E. D. Pa. 1937).

Moreover the greater part of the damage here cannot possibly be translated into monetary terms. The impairment of plaintiffs' bargaining position will have its consequences in the settlement of every one of the issues yet unresolved in the present controversy, and in the settlement of issues yet to come in the next round of negotiation with the Union. No judgment could fix reparation for this damage—a damage, furthermore, which would abide in some degree for as long as the plaintiffs and the Union have any relationship with each other. Nor could there be any possible monetary measure for the imposition of conditions such as the union shop, which are within Mr. Sawyer's purported powers. Compare *American Federation of Labor v. Watson*, 327 U. S. 582, 593-595 (1946); *Virginia Ry. Co. v. System Fed-*

eration No. 40, 300 U. S. 515, 550-553 (1937); *Texas & N. O. R. Co. v. Brotherhood of Railway Clerks*, 281 U. S. 548, 568-569 (1930).

C. In any event no money damages are recoverable.

No adequate money damages, of course, could be recovered from Mr. Sawyer personally, even for that portion of the injuries which might be measured in money. His individual wealth could not approach the amount of damage which this industry will suffer.

There remains only the question whether money damages would be recoverable against the United States, as Mr. Sawyer's counsel has suggested. It is plain that they would not.

The United States has consented to be sued for damages (i) under the Federal Tort Claims Act and (ii) in a suit for just compensation in the Court of Claims. Neither remedy is available.

(i) *The Federal Tort Claims Act is obviously unavailable.*

Mr. Sawyer's counsel suggested, in the District Court, that a suit thereunder would lie (R. 380); but this suggestion has not been pursued in the petition for certiorari in No. 745 and is hardly to be taken seriously. The plain words of the Act,* and its legislative history, exclude any such suit. *Coates v. United States*, 181 F. 2d 816, 818-819 (8th Cir.

* 28 U. S. C. §1346-b permits action against the United States for injury "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." If the seizure was unlawful, as we contend, Mr. Sawyer was not acting "within the scope of his office or employment." In any event 28 U. S. C. §2680-a expressly excludes from the scope of the Tort Claims Act claims based upon acts or omissions of Government employees "in the execution of a statute or regulation, whether or not such statute or regulation be valid".

1950). See also, *Old King Coal Co. v. United States*, 88 F. Supp. 124 (S. D. Iowa 1949); *Jones v. United States*, 89 F. Supp. 980 (S. D. Iowa 1949); cf. *Lauterbach v. United States*, 95 F. Supp. 479 (W. D. Wash. 1951); *Toledo v. United States*, 95 F. Supp. 838 (D. P. R. 1951); *Boyce v. United States*, 93 F. Supp. 866 (S. D. Iowa 1950); *J. B. McCrary Co. v. United States*, 84 F. Supp. 368 (Ct. Cls. 1949).

(ii) *It is equally obvious that there is no remedy in the Court of Claims.*

The argument in support of such a remedy necessarily assumes that the seizure was lawful. Indeed Mr. Sawyer's counsel expressly so conceded before Judge Pine (R. 380).^{*} If the seizure was unlawful, as we insist, Mr. Sawyer's action was not a "taking" by the United States for which just compensation is recoverable.

Decisions of this Court make that proposition clear. Thus in *Hooe v. United States*, 218 U. S. 322, 335-336 (1910), this Court said:

"The constitutional prohibition against taking private property for public use without just compensation is directed against the government, and not against individual or public officers proceeding without the authority of legislative enactment. The taking of private

^{*} The various attempts of that counsel in the District Court to "concede" that plaintiffs have an adequate remedy by way of a suit in the Court of Claims are not binding on the Government. It is well established that attorneys for the United States do not have power to waive or concede defenses available to the Government. *Munro v. United States*, 303 U. S. 36, 41 (1938); *Finn v. United States*, 123 U. S. 227, 233 (1887); *Wallace v. United States*, 142 F. 2d 240, 242-243 (2d Cir. 1944), cert. denied, 323 U. S. 712 (1944). Moreover, the concessions were concessions as to the law, which are not binding on a court. *Estate of Sanford v. Comm'r*, 308 U. S. 39, 51 (1939); *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U. S. 281, 289 (1917).

property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the government."

As pointed out above, the present seizure not only is not authorized by any act of Congress, but is squarely in conflict with the will of Congress as expressed in existing legislation.

In *United States v. North American Transportation and Trading Co.*, 253 U. S. 330, 333 (1920), this Court restated the rule that:

"In order that the Government shall be liable it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power."

See also *United States v. Goltra*, 312 U. S. 203, 208-209 (1941); *Mitchell v. United States*, 267 U. S. 341, 345 (1925); *Langford v. United States*, 101 U. S. 341, 345-346 (1879).

Mr. Sawyer's counsel cited to the District Court various cases said to support a claimant's right to compensation under the Fifth Amendment "even in the absence of express statutory provision." The cases he referred to involve the exercise by Government officials of the power of eminent domain conferred upon them by the legislature. In *Kohl v. United States*, 91 U. S. 367, 374-5 (1875), this Court asserted that the provisions of the act of Congress in question manifested " * * * a clear intention to confer upon the Secretary of the Treasury power to acquire the grounds needed by the exercise of the national right of eminent domain. * * * " Again, in *United States v. Causby*, 328 U. S. 256 (1946), the claimant was allowed to pursue his remedy in the Court of

Claims for a taking authorized by the Civil Aeronautics Act. And in the recent case of *Larson v. Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 695 (1949), this Court stated explicitly that the actions of the sovereign were compensable *only because they were in accordance with the terms of valid statutory authority*. Indeed, the opinion asserts, citing *Hooe v. United States*, 218 U. S. 322:

"There is no claim that [the administrator's] action constituted an unconstitutional taking. . . . There could not be since the respondent admittedly has a remedy, in a suit for breach of contract, in the Court of Claims. . . . *Only if the Administrator's action was within his authority could such a suit be maintained.*" (337 U. S. 682, 703 and n. 27.)

The distinction between these cases and that now before this Court is obvious. Where a Government official takes private property pursuant to statutory authority, the property owner may sue for just compensation even though the taking may not comply fully with the statutory procedure. As pointed out in footnote 11 on page 17 of the memorandum on behalf of Mr. Sawyer in the District Court, that type of illegality "does not go to the essence of the taking." See *Hurley v. Kincaid*, 285 U. S. 95, 104 (1932). But where the taking itself is utterly devoid of authority, the very illegality of which the plaintiffs complain also deprive them of any remedy in a suit for just compensation under the Fifth Amendment.

This clear and repeatedly asserted rule is a basic proposition in a legal system, such as ours, in which private rights are not at the mercy of unfettered executive action. For were the rule otherwise—were compensation at law available for a wholly unauthorized taking, and the doors of equity thereby closed to the private interest—not only

would the Federal Treasury be exposed to incalculable expense, but citizens would be exposed to arbitrary action by governmental officials to an extent altogether startling in its consequences. Compare *Garber v. United States*, 46 Ct. Cls. 503, 507-508 (1911).

No one would contend—least of all the courts—that the minimum constitutional compensation contemplated by the Fifth Amendment is adequately compensatory in any practical sense. Thus in *United States v. Petty Motor Co.*, 327 U. S. 372, 377-378 (1946), this Court stated that “evidence of loss of profits, damage to good-will, the expense of relocation and other such consequential losses are refused in federal condemnation proceedings.” Business losses and various consequential damages were said in *United States v. General Motors Corporation*, 323 U. S. 373, 379, 383 (1943), not to be compensable under the Fifth Amendment. Again in *United States v. Pewee Coal Co., Inc.*, 341 U. S. 114, 117 (1951), this Court recognized the inability properly to compensate one whose property was taken and referred to the “difficult problems inherent in fixing the value of the use of a going concern”.

It is no wonder, therefore, that the courts do not treat the remedy of monetary compensation in the Court of Claims as an available remedy where a taking is without color of legal authority. It may well be the price of living in an organized society to have to submit to monetary damages where the taking is lawful (*Kimball Laundry Co. v. United States*, 338 U. S. 1, 5 (1949)) or where the only dispute as to authority revolves about some incidental question—such as the time when damages will be paid, as in *Hurley v. Kincaid*, 285 U. S. 95, 104 (1932). It is quite another thing to say that property rights may be taken quite lawlessly, and the owner left to monetary claims

which can never, in any realistic sense, replace the rights lost.

It is doubtless this consideration which leads the courts so meticulously to make certain that full opportunity to question the legality of a taking must be assured, as a constitutional right, before the government may take any action, pursuant to a "taking" of property, which will impair the owner's use of his property in any way. See *Porto Rico Tel. Co. v. Puerto Rico Comm. Authority*, 189 F. 2d 39 (1st Cir. 1951), *cert. denied*, 342 U. S. 830 (1951). In *Catlin v. United States*, 324 U. S. 229, 241 (1945), this Court put the matter thus:

"The alternative construction, that title passes irrevocably, leaving the owner no opportunity to question the taking's validity or one for which the only remedy would be to accept the compensation which would be just if the taking were valid, would raise serious question concerning the statute's validity."

And it was doubtless this consideration also which led Congress to provide in the Defense Production Act of 1950 (*supra*, p. 50) that personal property could be requisitioned for defense use only after a previous valuation and tender of payment, and that real property could not be requisitioned at all, but could be taken only by condemnation proceedings in the courts.

The chief reliance of Mr. Sawyer's counsel for the proposition that money damages are available in the Court of Claims has been the citation of *United States v. Pewee Coal Co., Inc.*, 341 U. S. 114 (1951). But in that case, as already noted (*supra*, pp. 63-64), both the decision of the Court of Claims and the briefs of both sides in this Court made it

plain that the legality of the seizure was not in issue and was not decided, as Mr. Sawyer's counsel conceded in the District Court (R. 388).

POINT IV

The preliminary injunctions were providently issued by the District Court.

While this case involves an order of the District Court granting preliminary injunctions, it is apparent both from the opinion of that Court and from the petition filed here on behalf of Mr. Sawyer that the vital issue of the legality of the seizure is now ripe for final determination. In order to put an end to uncertainty prejudicial not only to the parties but to the public interest, that paramount issue should be finally resolved.

Page 11 of the petition filed on behalf of Mr. Sawyer in No. 745 states:

"The uncertainty which necessarily adheres in the present status of these cases overshadows all other considerations and requires an immediate resolution in the public interest of the substantive issues which were sweepingly decided below."

Again, on p. 21, the same petition recognizes:

"As long as the ultimate disposition of these cases is in doubt, the respective rights and obligations of all parties affected will be uncertain and the ability of the United States to take steps necessary to protect the nation against any further cessation or impairment of steel production will be a matter of potential controversy."

In these circumstances, and in view of the irreparable and continuing injury to which plaintiffs are exposed, the District Court, on the motions for preliminary injunctions, decided "the fundamental issue" whether the seizure was authorized by law. (Opinion of Judge Pine, R. 68) Recognizing that the matter had been thoroughly presented on the ultimate merits, the Court asserted:

"Nothing that could be submitted at such trial on the facts would alter the legal conclusion I have reached."
(R. 74)

Accordingly, nothing could be gained by the formality of a final hearing in the District Court on the constitutional issue there decided.

Even where an appellate court has power to review only a final decision of a lower court, it will decide the ultimate merits on an appeal from an order issuing a preliminary injunction where—as in the present case—the lower court "in fact fully adjudicated rights" in question. *Buscaglia v. District Court of San Juan*, 145 F. 2d 274, 281 (1st Cir. 1944), cert. denied, 323 U. S. 793 (1945). And this Court said in *United States v. Baltimore & Ohio Railroad Company*, 225 U. S. 306, 326 (1912):

"* * * we must not be understood as deciding or in any way implying that the duty would not exist to examine the merits of a preliminary order of the general character of the one before us in a case where it plainly, in our judgment, appeared that the granting of the preliminary order was in effect a decision by the court of the whole controversy on the merits, or where it was demonstrable that grave detriment to the public interest would result from not considering and finally disposing of the controversy without remanding to enable the court below to do so."

See *Coty v. Prestonettes, Inc.*, 285 Fed. 501, 516 (2d Cir. 1922); *Jackson Co. v. Gardiner Inv. Co.*, 200 Fed. 113, 115, 119 (1st Cir. 1912); cf. *City of Louisville v. Louisville Home Telephone Co.*, 279 Fed. 949, 957 (6th Cir. 1922).

The only reason advanced on behalf of Mr. Sawyer in the petition in No. 745 against the propriety of the issuance of the preliminary injunction—except for the argument on the validity of the Executive Order—is that constitutional issues should be avoided until the last possible moment. This argument is singularly inconsistent with the same petition's insistence upon the importance of an immediate disposition of the constitutional issues in this case. *Supra*, p. 86. Moreover the argument ignores the fact that plaintiffs are faced with immediate and continuing irreparable injury. Were Mr. Sawyer permitted to proceed pending a final hearing, no possible decree could restore the *status quo* and make the plaintiffs whole for the impairment of their bargaining position and the loss incident to terms and conditions of employment foisted upon them by Mr. Sawyer.

Consequently even if this Court were to feel it inappropriate finally to determine the constitutional issues at this stage, the preliminary injunction should not be disturbed. An order granting or denying a preliminary injunction will not be reversed in the absence of a clear showing that it was improvidently granted. *United States v. Corrick*, 298 U. S. 435, 437-438 (1936); *Alabama v. United States*, 279 U. S. 229, 231 (1929); *Meccano, Ltd. v. John Wanamaker*, 253 U. S. 136, 141 (1920); *City of Louisville v. Louisville Home Telephone Co.*, 279 Fed. 949, 956 (6th Cir. 1922). A preliminary injunction is warranted where there is serious doubt as to the validity of the action sought to be enjoined and a showing that an act is threatened which will destroy the *status quo* and cause

the complainant irreparable injury. *Gibbs v. Buck*, 307 U. S. 66, 77-78 (1939); *Ohio Oil Co. v. Conway*, 279 U. S. 813, 815 (1929); *Foster Packing Co. v. Haydel*, 278 U. S. 1 (1928); *Buscaglia v. District Court of San Juan*, 145 F. 2d 274, 281 (1st Cir. 1944), *cert. denied*, 323 U. S. 793 (1945); *Benson Hotel Corp. v. Woods*, 168 F. 2d 694, 696 (8th Cir. 1948).

At the very least, if this Court should not uphold the present injunction, a preliminary injunction should be continued in the terms prescribed by this Court in issuing its stay. A final hearing obviously would come on promptly. There can be no disputed issues of fact. Mr. Sawyer has been altogether candid in stating his intentions to act, and the public statement of the President on May 3 with respect to the government's prospective action is even more blunt. A final hearing and decision would be consummated within a few days after any remand by this Court. The considerations leading this Court unanimously to require maintenance of the *status quo* pending this Court's review would be fully applicable to a continuation of that restraint for a short time longer. In these circumstances the *obiter dicta* in *Yakus v. United States*, 321 U. S. 414, 440 (1944), even were they otherwise applicable to a case of this kind, would have no relevance; no public inconvenience has resulted from the stay issued by this Court and none could result from a brief continuance thereof.

POINT V

This is not a suit against the President; and the District Court had jurisdiction to grant the requested injunctions.

It was argued below that although the President was not named as a party, the action was in substance against him, since the defendant Sawyer was (in the phrase of his counsel) the "*alter ego* of the President", and that therefore no injunction could issue.

There is no substance to this claim. The only question for decision here is whether Mr. Sawyer is acting unlawfully. If he is, Presidential orders are no defense.

This Court has consistently recognized that officers of the executive branch may be sued when their conduct is unauthorized by any statute, exceeds the scope of constitutional authority, or is pursuant to an unconstitutional enactment. In these instances, the uniform course of judicial decision holds that the United States is not an indispensable party and that the relief sought is not against the Sovereign. *Waite v. Macy*, 246 U. S. 606 (1918); *cf. United States v. Lee*, 106 U. S. 196 (1882).

Recently, in *Larson v. Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 701-702 (1949), this Court reviewed the precedents and announced its adherence to the rule that

"* * * the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void."

Similarly in *Land v. Dollar*, 330 U. S. 731, 738 (1947), this Court observed:

"But public officials may become tort-feasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment."

The principles which are followed in determining whether a suit will lie against a Federal officer are necessarily those which govern the problem of indispensable parties. Thus, in *Ickes v. Fox*, 300 U. S. 82, (1937), this Court had for consideration the question whether the Secretary of the Interior could be enjoined from enforcing an order issued under the Reclamation Act of 1902. This Court asserted that, if the United States was an indispensable party defendant, the suit must fail, regardless of its merits, but held that the United States was not an indispensable party in a suit to enjoin enforcement by a government official of an order which would illegally deprive the plaintiff of vested property rights. This Court granted relief on the "recognized rule" set forth in *Philadelphia Company v. Stimson*, 223 U. S. 605, 619 (1912).

That the President is not an indispensable party here and that the suit is not directed against him is further demonstrated by *Williams v. Fanning*, 332 U. S. 490 (1947). That was a suit to enjoin a local postmaster from carrying out a postal fraud order of the Postmaster General. It was held that the Postmaster General was not an indispensable party. In language peculiarly pertinent to the present situation, this Court stated that equitable relief could be granted against the subordinate without joining his superior in situations where "the decree which is

entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court." (332 U. S. at 494.) See also, *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 96-97 (1949); *Lord Mfg. Co. v. Stimson*, 73 F. Supp. 984, 987 (D. D. C. 1947).

Therefore, this Court need never reach the question whether the President could be directly enjoined by the judiciary. There is here no attempt to compel Mr. Sawyer to take any affirmative action. Thus *Holzendorf v. Hay*, 20 App. D. C. 576 (1902), cited by Mr. Sawyer's counsel to the District Court, is not in point. There the court held that a mandatory injunction would not be granted to compel the Secretary of State to take affirmative action involving the conduct of relations with foreign governments. Here, on the contrary, the plaintiffs seek only the *restraint* of unlawful action which will result in irreparable injury.

The theory implicit in this branch of the argument on behalf of Mr. Sawyer is, however, worthy of more detailed attention. For the argument is apparently advanced that the courts can take no action whatever to thwart a President's will even though the judicial restraint is directed to a subordinate official. Cited to the District Court for this remarkable proposition were the *Holzendorf* case discussed above, and others, among them *Kendall v. United States*, 12 Pet. 522 (1838), and *Marbury v. Madison*, 1 Cranch 137 (1803). In the *Kendall* case,—in which, by the way, a mandamus was issued against the Postmaster General to compel him to observe an act of Congress—this Court observed on the page cited:

"The executive power is vested in a President; and so far as his powers are derived from the Constitution he is beyond reach of any other department . . ." (12 Pet. at 610.)

"It was urged at the bar, that the postmaster-general was alone subject to the direction and control of the president, with respect to the execution of the duty imposed upon him by this law; and this right of the president is claimed, as growing out of the obligation imposed upon him by the constitution, to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the president a dispensing power, which has no countenance for its support, in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the president with a power entirely to control the legislation of congress, and paralyze the administration of justice.

"To contend, that the obligation imposed on the president to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution and entirely inadmissible. * * *" (12 Pet. at 612-613)

Similarly a quotation from *Marbury v. Madison*, relied upon by Mr. Sawyer's counsel, is directed toward the discretion of the President in the exercise of the specific political powers with which he is invested by the Constitution. (1 Cranch at 165-166). It has no bearing on the power of the Federal Courts to restrain an executive officer whose actions are completely beyond the constitutional powers of the Executive.

In *Marbury v. Madison*, moreover, this Court observed (1 Cranch at 164-165):

"Is it to be contended that the heads of departments are not amenable to the laws of their country? Whatever the practice on particular occasions may be, the

theory of this principle will certainly never be maintained. No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law. After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone (vol. 3, p. 255), says, 'but injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers; for whom the law, in matters of right, entertains no respect or delicacy; but furnishes various methods of detecting the errors and misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice.'

Eloquent affirmation of the power of the Federal Courts to restrain unconstitutional action by officers of the executive department was given in *Fleming v. Moberly Milk Products Co.*, 160 F. 2d 259 (D. C. Cir. 1947), cert. dismissed, 331 U. S. 786 (1947). The suggestion that such restraint is beyond the power of the judiciary was characterized as a doctrine which "would spell executive absolutism, a concept unknown to our law." The Court concluded:

"If the judiciary has no power in such matter, the only practical restraint would be the self-restraint of the executive branch. Such a result is foreign to our concept of the division of the powers of government."
(160 F. 2d at p. 265.)

And in *United States v. Lee*, 106 U. S. 196, 220 (1882), this Court declared:

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."

Nor has the judiciary in the past felt itself powerless to declare the illegality of Presidential orders. In *Little v. Barreme*, 2 Cranch 170, 179 (*supra*, p. 44) this Court observed of an unlawful seizure order issued by the President to a naval officer:

“ . . . the instructions cannot change the nature of the transaction, nor legalize an act which, without those instructions, would have been a clear trespass.”

This Court further held that since the President's order was illegal, it furnished no protection to any naval officer who acted under it, and that Captain Little was therefore personally liable for damages. The case is noteworthy as a decision rendered by a great Federalist Chief Justice (speaking for a unanimous Court) declaring invalid a wartime order issued by the very Federalist President who had appointed him to the bench. It is cited in Cooley, *Principles of Constitutional Law* 114 (1896 Ed.) for the proposition that:

“As commander, while war prevails the President has all the powers recognized by the laws and usages of war, but at all times he must be governed by law, and his orders which the law does not warrant will be no protection to officers acting under them.”

And in *Gilchrist v. Collector*, 10 Fed. Cas. 355 (*supra*, p. 45) the court, in the face of arguments substantially identical with those presented here, and over the strong protests of the Attorney General, entered a mandamus to compel a subordinate official to disregard an unlawful order of the President.

The doctrine that obedience to the unlawful orders of a superior is no defense lies at the heart of Anglo-American

constitutional principles. As laid down by Professor Dicey (Law of the [British] Constitution, 1920 ed., p. 33):

"Indeed every action against a constable or collector of revenue enforces the greatest of all such principles, namely, that obedience to administrative orders is no defense to an action or prosecution for acts done in excess of legal authority".

Counsel for Mr. Sawyer now seek to overturn this basic principle, and in so doing to destroy the rule of law. The assertion that because this Court *may not* be able to enjoin the President in person, it therefore *cannot* enjoin any subordinate official of the Executive Branch, no matter how unlawfully he may act, is indeed startling.

Counsel for Mr. Sawyer cite, as substantially their sole authority on this branch of the argument, *Mississippi v. Johnson*, 4 Wall. 475 (1866). That decision held only that the President of the United States could not be restrained by injunction from carrying into effect an Act of Congress (the Reconstruction Act) alleged to be unconstitutional, and that a bill for that purpose in which the President was named as a defendant could not be filed.

This was described in the opinion (4 Wall. at 498) as "the single point which requires consideration." At the same page, the Court was careful to avoid laying down any absolute rule of Presidential immunity from suit. After commenting on its lack of power to restrain the enactment of an unconstitutional law, the Court observed:

"... and yet how can the right to judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished, in principle, from the right to such interposition against the execution of such a law by the President?" (4 Wall. at 500.)

Analysis of this keystone decision in opposing counsel's argument demonstrates the fallacy of their conclusion. The plaintiffs no more attempt here, in seeking to enjoin the action of a Government official, to restrain the President directly in the performance of his duties, than does one who attacks the constitutionality of a statute seek to impede the functioning of Congress.*

Neither *Mississippi v. Johnson* nor any other case in this Court has ever held, or can be twisted into meaning, that this Court cannot perform its historic duty of holding subordinate officials of the Government to account for their unlawful or unconstitutional acts.

CONCLUSION

Whether the position be baldly stated as in the District Court—or an effort made superficially to present it in less extreme form—the conclusion remains inescapable that counsel for Mr. Sawyer rely on a doctrine of Executive immunity from constitutional limitations and judicial restraints. They seek to justify a seizure, clearly without any vestige of support in the Constitution, on the ground that because an emergency has been declared by the Executive any action thereunder is sacrosanct. This doctrine is presented in its most extreme form in the present case where the “emergency” has been created by the device of ignoring the detailed statutory machinery specifically designed by the Congress for use in precisely the situation here presented. If the present Executive can seize properties and appropriate funds to force an increase in wages, a clear precedent will be established by which some future Executive can by similar arbitrary action force a decrease in wages or compel workers to labor for whatever hours

* See the analysis of *Mississippi v. Johnson*, by Brewer, J., in *Chicago & N. W. Ry. Co. v. Dey*, 35 Fed. 866, 872 (C. C. S. D. Iowa 1888).

and under whatever conditions he may choose to impose. It is not the rights of these plaintiffs alone which are at stake here. Our system of government has no place for any such concept of arbitrary power which, if once established, must be fatal to our liberties.

The judgments of the District Court in each of these cases should be affirmed.

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APPENDIX A

Relevant Provisions of the Constitution.

ARTICLE I.

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 8. [Clause 1.] The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; * * *

[Clause 11.] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

[Clause 12.] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

[Clause 13.] To provide and maintain a Navy;

[Clause 14.] To make Rules for the Government and Regulation of the land and naval Forces;

[Clause 15.] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

[Clause 16.] To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

[Clause 18.] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

ARTICLE II.

Section 1. The executive Power shall be vested in a President of the United States of America. * * *.

Section 2. [Clause 1.] The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective-Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

AMENDMENT 4.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT 5.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 9.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT 10.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Applicable Provisions of The Labor Management Relations Act of 1947, 61 Stat. 136 *et seq.*, 29 U. S. C. Supp. IV, §§158(a)(5), 158(b)(3), 158(d), 176-180.

Sec. 8. (a) It shall be an unfair labor practice for an employer—

.

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

.

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a) of this title;

.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . .

Sec. 206. Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

Sec. 207. (a) A board of inquiry shall be composed of a chairman and such other members as the President shall determine, and shall have power to sit and act in any place within the United States and to conduct such hearings either in public or in private, as it may deem necessary or proper, to ascertain the facts with respect to the causes and circumstances of the dispute.

(b) Members of a board of inquiry shall receive compensation at the rate of \$50 for each day actually spent by them in the work of the board, together with necessary travel and subsistence expenses.

(c) For the purpose of any hearing or inquiry conducted by any board appointed under this title, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as

amended (U. S. C. 19, title 15, secs. 49 and 50, as amended), are made applicable to the powers and duties of such board.

Sec. 208. (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

(b) In any case, the provisions of the Act of March 23 1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", shall not be applicable.

(c) The order or orders of the court shall be subject to review by the appropriate United States court of appeals and by the Supreme Court upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 29, secs. 346 and 347).

Sec. 209. (a) Whenever a district court has issued an order under section 208 of this title enjoining acts or practices which imperil or threaten to imperil the national

health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this chapter. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

Sec. 210. Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.

**The Defense Production Act, as Amended, 64 Stat. 798,
65 Stat. 132, 50 U. S. C. A., Appendix, §§2081, 2121-2123.**

Sec. 201. (a) Whenever the President determines (1) that the use of any equipment, supplies, or component parts thereof, or materials or facilities necessary for the manufacture, servicing, or operation of such equipment, supplies or component parts, is needed for the national defense, (2) that such need is immediate and impending and such as will not admit of delay or resort to any other source of supply, and (3) that all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property or the use thereof for the defense of the United States upon the payment of just compensation for such property or the use thereof to be determined as hereinafter provided. The President shall promptly determine the amount of the compensation to be paid for any property or the use thereof requisitioned pursuant to this title but each such determination shall be made as of the time it is requisitioned in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States. If the person entitled to receive the amount so determined by the President as just compensation is unwilling to accept the same as full and complete compensation for such property or the use thereof, he shall be paid promptly 75 per centum of such amount and shall be entitled to recover from the United States, in an action brought in the Court of Claims or, without regard to whether the amount involved exceeds \$10,000, in any district court of the United States, within three years after the date of the President's award, an additional amount which, when added to the amount

so paid to him, shall be just compensation. No real property (other than equipment and facilities, and buildings and other structures, to be demolished and used as scrap or secondhand materials) shall be acquired under this subsection.

(b) Whenever the President deems it necessary in the interest of national defense, he may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings to acquire by condemnation, any real property, including facilities, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that he deems necessary for the national defense, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357), as amended, or any other applicable Federal statute. Before condemnation proceedings are instituted pursuant to this section, an effort shall be made to acquire the property involved by negotiation unless, because of reasonable doubt as to the identity of the owner or owners, because of the large number of persons with whom it would be necessary to negotiate, or for other reasons, the effort to acquire by negotiation would involve, in the judgment of the President, such delay in acquiring the property as to be contrary to the interest of national defense. In any condemnation proceeding instituted pursuant to this section, the court shall not order the party in possession to surrender possession in advance of final judgment unless a declaration of taking has been filed, and a deposit of the amount estimated to be just compensation has been made, under the first section of the Act of February 26, 1931 (46 Stat. 1421), [40 U. S. C. §258a], providing for such declarations. Unless title is in dispute, the court, upon application, shall promptly pay to the owner at least 75 per centum of the amount

so deposited, but such payment shall be made without prejudice to any party to the proceeding. Property acquired under this section may be occupied, used and improved for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended [33 U. S. C. §733; 34 U. S. C. §520; 40 U. S. C. §255; 50 U. S. C. A., Appendix, §175].

(c) Whenever the President determines that any real property acquired under the title and retained is no longer needed for the defense of the United States, he shall, if the original owner desires the property and pays the fair value thereof, return such property to the owner. In the event the President and the original owner do not agree as to the fair value of the property, the fair value shall be determined by three appraisers, one of whom shall be chosen by the President, one by the original owner, and the third by the first two appraisers; the expenses of such determination shall be paid in equal shares by the Government and the original owner.

(d) Whenever the need for the national defense of any personal property acquired under this title shall terminate, the President may dispose of such property on such terms and conditions as he shall deem appropriate, but to the extent feasible and practicable he shall give the former owner of any property so disposed of an opportunity to reacquire it (1) at its then fair value as determined by the President or (2) if it is to be disposed of (otherwise than at a public sale of which he is given reasonable notice) at less than such value, at the highest price any other person is willing to pay therefor: Provided, That this opportunity to reacquire need not be given in the case of fungibles or items having a fair value of less than \$1,000.

TITLE V.—SETTLEMENT OF LABOR DISPUTES.

Sec. 501. It is the intent of Congress, in order to provide for effective price and wage stabilization pursuant to title IV of this Act and to maintain uninterrupted production, that there be effective procedures for the settlement of labor disputes affecting national defense.

Sec. 502. The national policy shall be to place primary reliance upon the parties to any labor dispute to make every effort through negotiation and collective bargaining and the full use of mediation and conciliation facilities to effect a settlement in the national interest. To this end the President is authorized (1) to initiate voluntary conferences between management, labor, and such persons as the President may designate to represent government and the public, and (2) subject to the provisions of section 503 to take such action as may be agreed upon in any such conference and appropriate to carry out the provisions of this title. The President may designate such persons or agencies as he may deem appropriate to carry out the provisions of this title.

Sec. 503. In any such conference, due regard shall be given to terms and conditions of employment established by prevailing collective bargaining practice which will be fair to labor and management alike, and will be consistent with stabilization policies established under this Act. No action inconsistent with the provisions of the Fair Labor Standards Act of 1938, as amended [29 U. S. C. §201 et seq.]; other Federal labor standards statutes, the Labor Management Relations Act, 1947 [29 U. S. C. §141 et seq.], or with other applicable laws shall be taken under this title.

The Universal Military Training and Service Act. 62 Stat. 625 et seq., 50 U. S. C. A. Appendix, Section 468.

Sec. 18. (a) Whenever the President after consultation with and receiving advice from the National Security Resources Board determines that it is in the interest of the national security for the Government to obtain prompt delivery of any articles or materials the procurement of which has been authorized by the Congress exclusively for the use of the armed forces of the United States, or for the use of the Atomic Energy Commission, he is authorized, through the head of any Government agency, to place with any person operating a plant, mine, or other facility capable of producing such articles or materials an order for such quantity of such articles or materials as the President deems appropriate. Any person with whom an order is placed pursuant to the provisions of this section shall be advised that such order is placed pursuant to the provisions of this section. Under any such program of national procurement, the President shall recognize the valid claim of American small business to participate in such contracts, in such manufactures, and in such distribution of materials, and small business shall be granted a fair share of the orders placed, exclusively for the use of the armed forces or for other Federal agencies now or hereafter designated in this section. For the purpose of this section, a business enterprise shall be determined to be "small business" if (1) its position in the trade or industry of which it is a part is not dominant, (2) the number of its employees does not exceed 500, and (3) it is independently owned and operated.

(b) It shall be the duty of any person with whom an order is placed pursuant to the provisions of subsection (a), (1) to give such order such precedence with respect to all other orders (Government or private) theretofore

or thereafter placed with such person as the President may prescribe, and (2) to fill such order within the period of time prescribed by the President or as soon thereafter as possible.

(c) In case any person with whom an order is placed pursuant to the provisions of subsection (a) refuses or fails—

(1) to give such order such precedence with respect to all other orders (Government or private) theretofore or thereafter placed with such person as the President may have prescribed;

(2) to fill such order within the period of time prescribed by the President or as soon thereafter as possible as determined by the President;

(3) to produce the kind or quality of articles or materials ordered; or

(4) to furnish the quantity, kind, and quality of articles or materials ordered at such price as shall be negotiated between such person and the Government agency concerned; or in the event of failure to negotiate a price; to furnish the quantity, kind, and quality of articles or materials ordered at such price as he may subsequently be determined to be entitled to receive under subsection (d) the President is authorized to take immediate possession of any plant, mine, or other facility of such person and to operate it, through any Government agency, for the production of such articles or material as may be required by the Government.

(d) Fair and just compensation shall be paid by the United States (1) for any articles or materials furnished pursuant to an order placed under subsection (a), or (2) as rental for any plant, mine, or other facility of which possession is taken under sub-section (c).

(e) Nothing contained in this section shall be deemed to render inapplicable to any plant, mine, or facility of which possession is taken pursuant to subsection (c) any State or Federal laws concerning the health, safety, security, or employment standards of employees.

(f) Any person, or any officer of any person as defined in this section, who willfully fails or refuses to carry out any duty imposed upon him by subsection (b) of this section shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not more than three years, or by a fine of not more than \$50,000, or by both such imprisonment and fine.

(g) (1) As used in this section—

(A) The term "person" means any individual, firm, company, association, corporation, or other form of business organization.

(B) The term "Government agency" means any department, agency, independent establishment, or corporation in the Executive branch of the United States Government.

(2) For the purposes of this section, a plant, mine, or other facility shall be deemed capable of producing any articles or materials if it is then producing or furnishing such articles or materials or if the President after consultation with and receiving advice from the National Security Resources Board determines that it can be readily converted to the production or furnishing of such articles or materials.

(h) (1) The President is empowered, through the Secretary of Defense, to require all producers of steel in the United States to make available, to individuals, firms,

associations, companies, corporations, or organized manufacturing industries having orders for steel products or steel materials required by the armed forces, such percentages of the steel production of such producers, in equal proportion deemed necessary for the expeditious execution of orders for such products or materials. Compliance with such requirement shall be obligatory on all such producers of steel and such requirement shall take precedence over all orders and contracts theretofore placed with such producers. If any such producer of steel or the responsible head or heads thereof refuses to comply with such requirement, the President, through the Secretary of Defense, is authorized to take immediate possession of the plant or plants of such producer and, through the appropriate branch, bureau, or department of the armed forces, to insure compliance with such requirement. Any such producer of steel or the responsible head or heads thereof refusing to comply with such requirement shall be deemed guilty of a felony and upon conviction thereof shall be punished by imprisonment for not more than three years and a fine not exceeding \$50,000.

(2) The President shall report to the Congress on the final day of each six-month period following the date of enactment of this Act the percentage figure, or if such information is not available, the approximate percentage figure, of the total steel production in the United States required to be made available during such period for the execution of orders for steel products and steel materials required by the armed forces, if such percentage figure is in excess of 10 per centum.

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SUPREME COURT, U.S.

Submitted by
CHARLES H. TUTTLE

IN THE

Supreme Court of the United States

October Term, 1951

Nos. 744, 745

Office - Supreme Court, U. S.

FILED

MAY 10 1952

CHARLES H. TUTTLE
CLERK

THE YOUNGSTOWN SHEET AND TUBE COMPANY, *et al.*, REPUBLIC STEEL CORPORATION, ARMCO STEEL CORPORATION and SHEFFIELD STEEL CORPORATION, BETHLEHEM STEEL COMPANY, *et al.*, JONES & LAUGHLIN STEEL CORPORATION, UNITED STATES STEEL COMPANY, and E. J. LAVINO & COMPANY,

Petitioners,

vs.

CHARLES SAWYER,

Respondent.

CHARLES SAWYER, Secretary of Commerce,

Petitioner,

vs.

THE YOUNGSTOWN SHEET AND TUBE COMPANY, *et al.*,

Respondents.

BRIEF FOR ARMCO STEEL CORPORATION
and
SHEFFIELD STEEL CORPORATION
Petitioners in No. 744 and Respondents in No. 745

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SUBJECT INDEX

	PAGE
I. The Constitutional Issues. Their Utmost Gravity	1
II. The Appellant's claims as stated in his brief in the District Court	6
III. The Attorney General's oral assertions in confirmation and extension of the foregoing new theories and terminologies in his brief below.....	12
"A Preferred Plane"	12
"Unlimited Power"	13
"The Courts cannot review"	13
No judicial Precedent	14
"Rather not answer" as to the effect on the Bill of Rights	14
Only "legislative powers" are limited by and enumerated in the Constitution.....	15
The Constitution has limited the powers of the Congress and of the Judiciary but not of the Executive	16
Expediency justifies the unlimited powers claimed	16
The Executive may ignore statutory provisions enacted for the very purpose.....	17
The appellant's brief below ignored the "Emergency Powers Interim Continuation Act", approved April 14, 1952.....	18

IV. The Acting Attorney General's restatement before the Court of Appeals of the foregoing claims	19
V. The many Constitutional barriers to the assumptions of these extraordinary powers.....	20
Provision "for the Common Defense and the General Welfare"	23
The exclusive legislative power of Congress.....	24
"Due process of law" is a legislative and judicial subject.....	25
The Executive's relation to "due process" of law" is solely that of assistance to the Legislative and Judicial Powers.....	25
The power to provide, support and maintain armies and a navy	28
The duty to "take Care that the Laws be faithfully executed"	29
The reservation of residual powers to the States and to the People.....	31
The foregoing constitutional restrictions are the more applicable because the Congress had already provided various statutory means for dealing with the emergency.....	32

POINT I. The predicates of power, implicit in the appellant's actions taken and to be taken, reverse the established principles of constitutional government and endow the Executive with a personal power over liberty and property, both undefined, unlimited and beyond existing constitutional restraints.

The arguments advanced for these predicates lead to the elevation of the Executive above the

Congress and the Judiciary; to the concept that the Executive, rather than the States and the People themselves, is the repository of the residuum of power; and to the ultimate result that rule by law loses all substance, and the country and all its people can pass into the hands of one man	34
---	----

POINT II. Where illegal actions, violative of the Bill of Rights and other prohibitions in the Constitution and in excess of constitutional power, are being taken by individuals claiming to act under direction of the Executive, the courts are not without power, and they have a constitutional duty, to declare void and to negate such actions.

The claim that such illegal and void actions are remedial only by suits for damages, is unsound, would render illusory the Bill of Rights and other constitutional restrictions, and would deprive the parties aggrieved of any effective, adequate or even enforceable remedy	44
--	----

SUMMARY	52
---------------	----

CONCLUSION	53
------------------	----

TABLE OF CASES

PAGE

A. F. of L. v. American Sash Co., 335 U. S. 538	42, 48
Anti-Fascist Committee v. McGrath, 341 U. S. 123	47
Ashwander v. Tennessee Valley Authority, 297 U. S. 288	38
Bailey v. Richardson, 341 U. S. 918	47
Bell v. Hood, 327 U. S. 678	59
Boyce v. United States, 93 F. Supp. 866	52
Brannan v. Stark, 342 U. S. 451	47
Carter v. Carter Coal Co., 298 U. S. 238	51
Case of Proclamations, 12 Coke's Reports 74	26
Cochnower v. United States, 248 U. S. 405	39

	PAGE
Colegrave v. Green, 328 U. S. 549	48
Colorado v. Toll, 268 U. S. 228	47
Communications Ass'n v. Douds, 339 U. S. 382	33
C & S Air Lines v. Waterman Corp., 333 U. S. 103	48
Dennis v. United States, 341 U. S. 494	36
Di Santo v. United States, 93 F. 2d 948	41
Duncan v. Kahanamoku, 327 U. S. 304	35
Eastern Trust Co. v. McKenzie, Mann & Co., Ltd., 1915 A. C. 750	29
Ex Parte Merryman, 17 Fed. Cas. 144	26, 36
Ex Parte Milligan, 4 Wallace (71 U. S.) 2	20, 21, 22, 35
Ex Parte Quirin, 317 U. S. 1	40
Feres v. United States, 340 U. S. 135	52
Filbin Corp. v. United States, 266 Fed. 911	35, 36
Fleming v. Moberly Milk Products Co., 160 F. 2d 259	47
Franklin Township v. Tugwell, 85 F. 2d 208	47
Gelston v. Hoyt, 3 Wheat. 246	35
Glavey v. United States, 182 U. S. 595	39
Goltra v. Weeks, 271 U. S. 536	47
Harisiades v. Shaughnessy, 342 U. S. 580	36, 43
Hirabayashi v. United States, 320 U. S. 81	40
Home Building Loan Assn. v. Blaisdell, 290 U. S. 398	22
Hope v. United States, 218 U. S. 322	37
Humphrey's Executor v. United States, 295 U. S. 602	48
Ickes v. Fox, 300 U. S. 82	47
Jones v. United States, 89 F. Supp. 980	52
Larson v. Domestic and Foreign Corp., 337 U. S. 682	45, 47
Lauterbach v. United States, 95 F. Supp. 479	52
Madsen v. Kinsella, 20 U. S. Law Week, 4271	43
Massachusetts v. Mellon, 262 U. S. 447	46
J. B. McCrary Co., Inc. v. United States, 84 F. Supp. 368	52
Mississippi v. Johnson, 4 Wall. 475	48
Mitchell v. Harmony, 13 Howard 115	35

Index

v6

	PAGE
Muir v. Louisville & N. R. R., 247 Fed. 888	36
Myers v. United States, 272 U. S. 52	48
• Noble v. Union River Logging Railroad Co., 147 U. S. 165	47
Old King Coal Co. v. United States, 88 F. Supp. 124	52
O'Neal v. United States, 140 F. 2d 908	40
Osborne v. Missouri Pacific Railway Co., 147 U. S. 248	51
Panama Refining Co. v. Ryan, 293 U. S. 388	41
Pennikamp v. Florida, 328 U. S. 331	43, 48
Philadelphia Co. v. Stimson, 223 U. S. 605	47, 50
Sawyer v. Dollar, 190 F. 2d 623	47
School of Magnetic Healing v. McAnnulty, 187 U. S. 94	47
Sterling v. Constantin, 287 U. S. 378	35, 47
• The Flying Fish (Little v. Barrême) 2 Cranch (6 U. S.) 170	32, 35
The Orono, 18 Fed. Cas. 830	35, 47
Toledo v. United States, 95 F. Supp. 833	52
Toledo, P. & W. R. R. v. Stover, 60 F. Supp. 587	36
United States v. Acres of Land, 22 F. Supp. 1017	37
United States v. California, 332 U. S. 19	39
United States v. Causby, 328 U. S. 256	49
United States v. Cornell, 36 F. Supp. 81	37
United States v. Eaton, 144 U. S. 677	38
United States v. George, 228 U. S. 14	38
United States v. Lee, 106 U. S. 196	30, 45
United States v. McFarland, 15 F. 2d 823	41, 47
United States v. Newman, 44 F. Supp. 817	37
United States v. North American Co., 253 U. S. 330	37
United States v. Pewee Coal Co., 341 U. S. 119	49
United States v. The Franklin, 18 Fed. Cas. 830	32
United States v. Wunderlich, 342 U. S. 98	43
Utah Fuel Co. v. Coal Comm., 306 U. S. 56	47
Woods v. Miller, 333 U. S. 138	36

Statutes and Constitutional Provisions

PAGE

Constitution of the United States:

Preamble	23, 27
Art. I, Sec. 1	24
Art. I, Sec. 7	28
Art. I, Sec. 8	28
Art. I, Sec. 8(1)	23, 40
Art. I, Sec. 8(11)	28, 35
Art. I, Sec. 8(12)	28, 37
Art. I, Sec. 8(13)	28
Art. I, Sec. 8(18)	23
Art. I, Sec. 9	28
Art. I, Sec. 9(7)	40
Art. II, Sec. 2(1)	28
Art. II, Sec. 3	24, 26
Art. II, Sec. 7	26
Art. IV, Sec. 3(2)	38
Art. VI	23, 25
Ninth Amendment	31
Tenth Amendment	31
Thirteenth Amendment	38

Public Law 313, c. 204

82d Congress, 2d Session (Emergency Powers Interim Continuation Act, April 14, 1952)	18
---	----

United States Code:

28, Sec. 1346(b)	52
28, Sec. 1491(1)	49
28, Sec. 2680	51
29, Sec. 176-178	33
50 App. Sec. 468	32
50 App. Sec. 2081(b)	33

Other Authorities

	PAGE
18 American Jurisprudence, Eminent Domain, Sec. 9	37
Black, Constitutional Law (3 ed.) Sec. 82	36
Congressional Globe (May 7, 1834)	5
Congressional Record (March 13, and April 23, 1947)	33
Halsbury, Laws of England (2d Ed.)	29
Legislative History of Labor Management Rela- tions Act	33
Magna Charta, Art. 39	26
Pomeroy, Equity Jurisprudence 5th ed., Sec. 1357	50
Roosevelt (Theodore) Autobiography	6
Taft (W. H.) Our Chief Magistrate and his Power	7
Time Magazine (April 28, 1952)	11
Warren, Congress, The Constitution and The Supreme Court	10, 46

IN THE
Supreme Court of the United States
October Term, 1951

Nos. 744, 745

THE YOUNGSTOWN SHEET AND TUBE COMPANY, *et al.*,
REPUBLIC STEEL CORPORATION, ARMCO STEEL CORPORATION
and SHEFFIELD STEEL CORPORATION, BETHLEHEM STEEL
COMPANY, *et al.*, JONES & LAUGHLIN STEEL CORPORATION,
UNITED STATES STEEL COMPANY; and E. J. LAVINO & Co.,

Petitioners,
vs.

CHARLES SAWYER,

Respondent.

CHARLES SAWYER, Secretary of Commerce,

Petitioner,
vs.

THE YOUNGSTOWN SHEET AND TUBE COMPANY, *et al.*,
Respondents.

**BRIEF FOR ARMCO STEEL CORPORATION
and
SHEFFIELD STEEL CORPORATION**

On April 30, 1952, the District Court for the District of Columbia (Pine, J.) granted preliminary injunctions (R. 76), with opinion (R. 65). Petitions by both sides for certiorari were granted on May 3, 1952, under 28 U. S. C., §1254(1).

I

The Constitutional Issues. Their Utmost Gravity.

(1) On April 8, 1952, Congress was in session and had been for months.

On April 8, 1952, the appellant informed these respondents and the other respondents constituting the steel industry of the country that he took possession of their "plants, facilities and other properties for operation by the United States in order to assure the continued availability of steel and steel products during the existing national emergency proclaimed on December 16, 1950."

He stated that this seizure included (R. 22):

"All real and personal property, franchises, rights, funds and other assets used or useful in connection with the operation of such plants, facilities and other properties and in the distribution and sale of the products thereof."

The appellant stated that he thus acted (R. 22)

"By virtue of the authority vested in me by the President of the United States under an Executive Order dated April 8, 1952, directing the Secretary of Commerce to take possession of and operate the plants and facilities of certain steel companies."

The appellant further stated that he reserved the right to make "regulations and orders" for the operation, and to continue possession and operation until "*such time as he may find that such possession and operation are no longer required in the interest of national defense*" (R. 23). (Italics ours.)

The Executive Order, to which the appellant referred and which cited no statute, provided (R. 8):

"The Secretary of Commerce *shall determine and prescribe terms and conditions of employment* under which the plants, facilities and other properties, possession of which he has taken pursuant to this order, shall be operated." (Italics ours.)

3

The Executive Order further provided that "*except so far as the Secretary of Commerce shall otherwise provide from time to time*", the managements of the plants shall continue in the "usual course of business", and "existing rights and obligations of such companies shall remain in full force and effect" (R. 8).

(2) On Saturday, May 3, 1952, in an official statement made by the President at the White House to representatives of the steel mills and union workers, and released to the press and the public, the President said that unless an agreement as to terms and conditions of employment was immediately arrived at

"The Government will be prepared on Monday morning, or as soon as we can get ready, to order changes in terms and conditions of employment to be put into effect. * * * But we will have no choice if you cannot agree."

These new "terms and conditions" would not be financed by public funds appropriated by Congress but by *private funds* confiscated for the purpose by the appellant from these and the other respondents.

(3) The many constitutional issues thus raised are among the gravest in our history. They are recognized by all as involving the whole substance and philosophy of our fundamental form of government as one solely of delegated, distributed and balanced powers, and with all other powers "reserved to the States respectively, or to the people".

The appellant's counsel have conceded that neither the Executive Order, nor the appellant's own action of

April 8, 1952, nor the proposed action as promulgated on May 3, 1952, derive authority from or proceed in accordance with any statute.

The appellant's sole claims are that there is somewhere a body of residual and inherent powers possessed by the President *ex officio* which entitle him to take such actions whenever in his judgment the general welfare and common defense so requires; and that such actions by the President endow themselves with due process of law, legislative efficacy and an immunity from judicial scrutiny and adjudication which extends even to all persons who are designated agents of the President in the effectuation and continuance of such actions, on his part.

No limitations other than the President's own appraisal of the general welfare and common defense are recognized, admitted or stated. Powers expressly delegated to the Legislative or Judicial Branches of the Government are thereby transferred to the Executive Branch. Powers expressly reserved to the States or to the People are thereby assumed by the Executive. Powers expressly prohibited to the Federal Government by the Constitution and the Bill of Rights are thereby, in the case of the Executive, emancipated from the constitutional prohibitions.

What is now at stake is rule by law in these United States. The power now claimed is, in its extents, essence, indefinite duration, and predicates the power to rule indefinitely by personal edict. It is the reverse of constitutional rule under law enacted by Congress through whom the people speak and to whom the people have given their consent for the making of the laws for their government.

The powers now claimed derive not from the Constitution but from the doctrine of expediency and from the principle that the end justifies the means. Such doctrine and principle once accepted break through the walls of the Constitution and the Bill of Rights and open the way for the erosion and disintegration of American constitutional institutions under pressure of a superior power of presidential absolutism.

Presidential seizures by sanction of supposed "residual power" may simplify government; but such simplification, once accepted, can speedily become the opiate of free democracy.

Senator Daniel Webster in an historic speech upon the floor of the Senate, resisting claims of power assumed by President Jackson, declared (*Congressional Globe* (pp. 1674-5), May 7, 1834):

"The first object of a free people is the preservation of their liberty; and liberty is only to be preserved by maintaining constitutional restraints and just divisions of political power. * * *. The spirit of liberty is, indeed, a bold and fearless spirit; but it is also a sharp-sighted spirit; it is a cautious, sagacious, discriminating, far-seeing intelligence; it is jealous of encroachment, jealous of power, jealous of man. * * *. If we will abolish the distinction of branches, and have but one branch; if we will abolish jury trials, and leave all to the judge; if we will then ordain that the legislator shall himself be that judge; and if we will place the executive power in the same hands, we may readily simplify government. We may easily bring it to the simplest of all possible forms, a pure despotism."

II

The Appellant's claims as stated in his brief in the District Court.

(1) Judge Pine, in referring to the basic contentions in the Attorney General's brief as submitted to him, said (R. 73):

"Enough has been said to show the utter and complete lack of authoritative support for defendant's position. That there may be no doubt as to what it is, he states it unequivocally when he says in his brief that he does 'not perceive how Article II [of the Constitution] can be read * * * so as to limit the Presidential power to meet all emergencies,' and he claims that the finding of the emergency is 'not subject to judicial review.' To my mind this spells a form of government alien to our constitutional government of limited powers."

(2) In that brief the appellant advocated (p. 28) what he referred to as "the 'stewardship' theory of the Presidency".

In support and elaboration of that theory he quoted and adopted its definition in Theodore Roosevelt's "*Autobiography*", pp. 388-9 (pp. 28-9):

"My belief (as to the Presidency) was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws. * * * In other words, I acted for the public welfare, I acted for the common well-being of all our people, whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition."

In support of this "stewardship" theory the appellant's brief in the District Court (p. 28) also quoted and of necessity took issue with the following contrary statement by President Taft in his treatise entitled "*Our Chief Magistrate and his Powers*" (p. 139):

"The true view of the Executive function is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. *Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest, and there is nothing in the Neagle case and its definition of a law of the United States, or in other precedents, warranting such an influence. The grants of Executive power are necessarily in general terms in order not to embarrass the Executive within the field of action plainly marked for him, but his jurisdiction must be justified and vindicated by affirmative constitutional or statutory provision, or it does not exist.*" (Italics ours.)

In his decision Judge Pine stated that he took his stand on the above formulation by Chief Justice Taft "as a correct statement of the law" (R. 70); and, referring to "the stewardship theory" stated by President Theodore Roosevelt *supra*, and advocated by the defendant, Judge Pine said (R. 73):

"That is defendant's only support for his position and for his 'Stewardship' theory of the office of President, but with all due deference and respect for that great President of the United States, I am obliged to say that his statements do not comport with our recognized theory of government, but with a theory with which our government of laws and not of men is constantly at war."

(3) In consequence and according to the logic of "the stewardship theory", the appellant's brief further claimed that this alleged power to act in any manner for the public welfare ("unless prevented by direct constitutional or legislative prohibition") was "a residual power in the President" (p. 30), who thereby acquired inherent power to exercise it in accordance with his own judgment and under such circumstances and for such duration as in his discretion he might deem required by "the needs of the Nation".

In further consequence, and in order properly to style the repository of these extraordinary powers, the appellant's brief (p. 27) referred to the President as "*Chief of State*",—a title unknown to our Constitution and laws,—precisely as the brief's coined phrases "residual power" and "residuum of power" are also unknown to our Constitution and laws. This new title "*Chief of State*" savors of an executive absolutism familiar in other nations where such title has been deemed significantly descriptive. In our constitutional system, the people themselves are "the Chief of State", for this is a "government of the people, by the people and for the people"; and all residual power is reserved to the people and their respective States. The Constitution recites itself as ordained and established by "We the People of the United States."

(4) All these new phrases, now minted outside of the text of the Constitution but now sought to be superimposed upon it, were gathered up in one pronouncement in the footnote on page 27 of the appellant's brief in the District Court, and were there made the basis of all the new theories of government which that brief seeks to derive from its substituted phraseologies. That footnote is as follows (p. 27):

"It should be noted that we do not contend that the President has a residuum of powers outside of the Constitution inherent in his position as Chief of State, as plaintiffs would have this Court believe our position to be. We contend only that he has such powers under the Constitution and concede that his actions are subject to constitutional limitations. In the instant case, the applicable limitation is that just compensation be paid for the taking of plaintiffs' properties in accordance with the mandate of the Fifth Amendment."

In other words, we have here the bald contention by the appellant in his brief below that the President as "Chief of State", and in the exercise of "a residuum of powers" allegedly remaining after and over and above the Constitution's system of delegated powers, can brush aside even the guaranties of the Bill of Rights with no possibility of judicial interference and with no consequence other than a possibility that the outraged citizen may secure monetary compensation from some unstated source.

(5) Any lingering thought that under these new doctrines the Judicial Branch could by injunction prevent the President from thus using a so-called "residual power" to invade the field of the Bill of Rights, is expressly ruled out by the appellant's brief in the District Court, which stated (p. 19):

"The suggestion that the judiciary will use the force of an injunction to restrain the President in action which he believes to be necessary to the welfare of the nation is in itself somewhat startling."

In other words, although the Judicial Branch of the Government has, for over a century, been adjudicating void and restraining action taken under Acts of Congress

which the Judiciary finds to be contrary to the Constitution or the Bill of Rights, the appellant's brief below declares "startling" any exercise of like judicial power in the case of like action taken by the President's subordinates at his direction!

Indeed, the appellant's brief below goes so far as to say expressly (pp. 44-5) that the President, in the exercise of this supposed "residuum of power" "*has similar inherent powers in the nature of eminent domain and police power without statutory authorization.*"

The appellant's brief below also pushed its contention so far as to claim that, because the courts will not proceed against the *person* of the President, such individual and personal immunity extends to all his subordinates from the highest to the lowest on the theory that each is the President's *alter ego*.

In pointing out the untenableness under the Constitution of such a claim of unfettered executive power, Charles Warren, in his treatise on "*Congress, The Constitution, and The Supreme Court*", truly said (pp. 251-2):

"Yet it is well known that if a case arises in Court in which an action of the President violative of the Constitution is set up by a party to the suit, either as a defense or as a ground of action, the Court will not hesitate, and in the past has not hesitated, to declare such Presidential action to be void and of no effect and hence incapable of affording to any person a valid defense to the suit or a valid basis for recovery in the suit."

(6) If these claims of unlimited powers and of unlimited power of delegation are upheld, and can become a precedent, then our federal government ceases to be a Government of enumerated delegated powers only, with careful and adequate checks and balances and with the reserva-

tion to the States and to the people of all undelegated powers; and, instead, it becomes a Government of powers wholly plenary and unlimited and undefined in content and duration save to such extent as there may be express, enumerated prohibitions.

Furthermore, if the basic guarantee of the Bill of Rights against depriving citizens of their liberty and property without due process of law can thus be set aside by one man, whose personal fiat must be deemed due process of law, then all the other guarantees in the Bill of Rights are also subject to be superseded and taken away by the same unlimited personal power and by the same extraordinary process of reasoning; and this plenary power, thus postulated as "the residuum of power", becomes an open highway for a march to Executive absolutism.

(7) Obviously, if this unlimited power to seize an entire industry rests in the discretion of the Executive, it may be used as readily against the employees and their unions as against the employers, their plants and the investments of the stockholders.

As said in the last few days by James P. Shields, Grand Chief Engineer of the Brotherhood of Locomotive Engineers (*Time Magazine*, "Labor", April 28, 1952, p. 20):

"In the light of the Cleveland decision, and the seizure of the steel industry, this nation is faced with the specter of continuing and expanding involuntary servitude unless present seizure tactics are wiped out on constitutional grounds."

III

The Attorney General's oral assertions in confirmation and extension of the foregoing new theories, and terminologies in his brief below.

In the argument before Judge Pine, the Assistant Attorney General (Mr. Baldrige) made specific and unequivocal the numerous corollaries which follow from the aforesaid extraordinary claims and new terminologies in his brief below.

The following are some of his stark and startling statements, as recorded in the official minutes:

"A Preferred Plane"

Pages 139-140:

"The Court: Now, you contend that exercising powers where there is no statute makes a case stand on a different plane—a preferred plane?"

Mr. Baldrige: Correct. Our position is that there is no power in the Courts to restrain the President and, as I say, Secretary Sawyer is the alter ego of the President and not subject to injunctive order of the Court.

The Court: If the President directs Mr. Sawyer to take you into custody, right now, and have you executed in the morning you say there is no power by which the Court may intervene even by habeas corpus?

Mr. Baldrige: If there are statutes protecting me I would have a remedy.

The Court: What statute would protect you?

Mr. Baldrige: I do not recall any at the moment.

The Court: But on the question of the deprivation of your rights you have the Fifth Amendment;

that is what protects you. I would like an answer to that—what about that?

Mr. Baldrige: Well, as I was going to point out in a little while—

The Court (interposing): I will give you a chance to think about that overnight and you may answer me tomorrow."

"Unlimited Power"

Pages 154-155:

"The Court: So you contend the Executive has unlimited power in time of an emergency?

Mr. Baldrige: He has the power to take such action as is necessary to meet the emergency.

The Court: If the emergency is great, it is unlimited, is it?

Mr. Baldrige: I suppose if you carry it to its logical conclusion, that is true. But I do want to point out that there are two limitations on the Executive power. One is the ballot box and the other is impeachment."

"The Courts cannot review"

Page 155.

"The Court: Then, as I understand it, you claim that in time of emergency the Executive has this great power.

Mr. Baldrige: That is correct.

The Court: And that the Executive determines the emergencies and the Courts cannot even review whether it is an emergency.

Mr. Baldrige: That is correct."

No Judicial Precedent

Page 156:

"The Court: Do you have any case of a seizure except a seizure authorized by statute during wartime, which made the statute constitutional?"

Mr. Baldridge: Well, we have set out in our brief a number of instances, your Honor, in which seizure occurred in the absence of statutory authorization.

The Court: I mean where the Courts approved it.

Mr. Baldridge: I do not know of any—

The Court: I do not think a seizure without judicial interference is relevant. The fact that a man reaches in your pocket and steals your wallet is not a precedent for making that a valid act."

"Rather not answer" as to the effect on the Bill of Rights

Pages 163-164:

"The Court: That may have been a hard case that I used as an example. Let me put a case to you that is not quite so difficult: Supposing the President should declare that the public interest required the seizure of your home and directed an agent to seize it and to dispossess you: Do you think or do you contend that the court could not restrain that act because the President had declared an emergency and because he had directed an agent to carry out his will?"

Mr. Baldridge: I would rather, Your Honor, not answer a case in that extremity. We are dealing here with a situation involving a grave national emergency. I think that in determining the question whether the courts can enjoin executive power, it is essential that you look at the circumstances which give rise to the exercise of that power. I think that here, particularly in view of the affidavits that have

been filed in support of the position—that certainly there has been no attempt made to deny that there was and that there is a grave national emergency that requires the exercise of rather unusual powers in these particular circumstances. I do not believe any President would exercise such unusual power unless, in his opinion, there was a grave and an extreme national emergency existing.

The Court: Is that your conception of our Government?

Mr. Baldridge: Our conception of the powers of the Executive, Your Honor, is that under the doctrine of separation of powers—which I shall discuss a little more at length after a while—that, except for an occasional overlapping, there have not been and are not any instances of importance where one branch of the Government attempts to encroach upon the power and authority of the other.”

**Only “legislative powers” are limited by and
enumerated in the Constitution**

Pages 164-165:

“The Court: Well, is it not your conception of our Government that it is a Government whose powers are derived solely from the Constitution of the United States?

Mr. Baldridge: That is correct.

The Court: And is it not also your view that the powers of the Government are limited by and enumerated in the Constitution of the United States?

Mr. Baldridge: That is true, Your Honor, with respect to legislative powers.

The Court: But it is not true, you say, as to the Executive?

Mr. Baldridge: No. Section 1, of Article II of the Constitution—”

**The Constitution has limited the powers of the
Congress and of the Judiciary but not of the
Executive**

Pages 165-166:

"The Court: So, when the sovereign people adopted the Constitution, it enumerated the powers set up in the Constitution but limited the powers of the Congress and limited the powers of the judiciary, but it did not limit the powers of the Executive. Is that what you say?

Mr. Baldridge: That is the way we read Article II of the Constitution."

Expediency justifies the unlimited powers claimed

Pages 235-6:

"The Court: Then you assail the efficacy of our Government procedures set up by the Constitution?

Mr. Baldridge: "I beg your pardon?

The Court: "You assail the efficacy of our Government procedures set up by the Constitution?

Mr. Baldridge: Not at all, Your Honor. I just say, to have employed them on the night of April 8th would have resulted in a strike which would have stopped steel production which is so necessary to the national defense.

The Court: Do you think that is an answer to my question?

The Court: You have lack of confidence in the procedure set up by the Constitution to deal with an emergency situation?

Mr. Baldridge: No, I do not, Your Honor. I just say that as of midnight on April 8th this seizure procedure appeared to be the only effective way to avoid a strike and to avoid a cessation for an indefinite period of production of steel necessary to national security and national defense.

The Court: Well, we have had crises before in this country, and we have had governmental machinery that was adequate to cope with it. *You are arguing for expediency. Isn't that it?*

Mr. Baldrige: *Well, you might call it that, if you like. But we say it is expediency backed by power."*

In short, the Executive's conception of expediency creates its own effective and plenary constitutional power! The principle that the end justifies the means must be deemed implicit in the Constitution in the case of the Executive but not in the cases of the Legislature and the Judiciary!

The Executive may ignore statutory provisions enacted for the very purpose.

The appellant's brief below further stated (p. 64) that the President had an inherent power to elect to choose the statutory procedures provided by the Congress or to "invoke his emergency powers under the Constitution"; and that any contention to the contrary "would amount to holding that the President is powerless to alter his own policy."

In other words, the bald claim as now made by the appellant is that the President is not bound to respect, use and execute the statutes and public policy enacted by the Congress as the repository of "all legislative powers", but may proceed in disregard thereof, may create and enforce his own concepts of public policy, and thus by his own bootstraps may lift himself free from his Constitutional duty to "take Care that the Laws be faithfully executed."

The appellant's brief below ignored the "Emergency Powers Interim Continuation Act", approved April 14, 1952.

This Act extended to June 1, 1952, certain emergency powers of the President enacted during the previous state of war; but it specifically provided:

"Sec. 5. Nothing contained herein shall be construed to authorize seizure by the Government, under authority of any Act herein extended, of any privately owned plants or facilities which are not public utilities."

Here was an express statutory restriction and prohibition on the powers of the President—a legislative declaration of public policy which he was bound to respect. Although enacted after this seizure commenced, it expressly excludes any statutory authority for its continuance, and leaves such continuance dependent solely on a claim that the President can ignore the enactments of the Congress and continue his own public policy after the Congress has spoken to the contrary.

Furthermore, the President's declaration at the White House on May 3, 1952, that the appellant would in the next several days take the funds of the steel companies in order to finance new and more expensive "terms and conditions of employment", assures a new seizure, a fresh confiscation, *after* the taking effect of the above statute, and hence a new ignoring of its provisions and its public policy.

The Acting Attorney General's restatement before the Court of Appeals of the foregoing claims.

The press has carried some seeming attempt by representatives of the Executive to water down or to veneer with somewhat smoother phraseology the foregoing stark claims advanced by the Department of Justice before Judge Pine.

But, before the Court of Appeals, Mr. Perlman, the Acting Attorney General, reiterated and reemphasized the basic contentions essential to the appellant's case, namely: that the President may determine in his best judgment what constitutes an emergency and the measures necessary to deal with it, and that such determination and measures thereupon acquire the force of law and due process; and that actions thereunder by his designees or agents are beyond review by the courts. Mr. Perlman said (Tr. pp. 132-3):

“Mr. Perlman: Now, the District Court has undertaken—and I do not say this hostilely, but I want to emphasize it—has undertaken, so far as I know, for the first time in the history of this nation, to issue an injunction against the President of the United States and the Commander in Chief of the Armed Forces and—

Judge Edgerton (interposing): I thought the injunction was against Mr. Sawyer.

Mr. Perlman: Yes; he is acting under the Executive Order of the President and Commander in Chief of the Armed Forces and the District Court is, in essence, acting against the President of the United States. . . .

The Chief Judge: It seems to me that the Government is suggesting that an act of the President performed through an agency of the President, like the Secretary of Commerce, that the question of whether he is acting legally or illegally is not one for the Court to determine; and that the Court could not legally stop that action if it was found to be illegal.

We have never been told that before."

V

The many Constitutional barriers to the assumptions of these extraordinary powers.

(1) The basic constitutional principles and provisions which invalidate the actions taken and about to be taken by the appellant were classically expounded in the foundational case of *Ex parte Milligan*, 4 Wallace (71 U. S.) 2, decided in 1866. There this Court held that the constitutional guaranty of trial by jury "was intended for a state of war as well as a state of peace," and "is equally binding upon rulers and people, at all times and under all circumstances."

The argument to the contrary by the Special Counsel for the United States rested precisely on the very principles which the present appellant now advances, to wit: that the right to deny *habeas corpus* to the accused needed no legislation by Congress but was "clearly within his (the President's) power as Commander-in-Chief" (p. 16), and that (p. 18):

"This right and power thus granted to the Federal government is in its nature entirely *executive*, and in the absence of constitutional limitations would be wholly lodged in the President as chief executive

officer and Commander-in-Chief of the Armies and Navies. * * * During the war his powers must be without limit."

Thereupon, this effort to regard the Executive as possessing, in time of war, a residual and inherent power "without limit" was utterly rejected by this Court, which said (p. 121):

"No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. *Such a doctrine leads directly to anarchy or despotism*, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority." (Italics ours.)

And again (p. 121):

"They (the military commission) cannot justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws."

And again (p. 126):

"The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. *Knowing this, they limited the suspension to one great right, and left the rest to remain forever inviolable*. But, it is insisted that the safety of the country in time of war

demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so." (Italics ours.)

If these constitutional principles could not be breached by the Executive in time of active and declared war on the very soil of this country, how can they be lawfully breached by the Executive when there is no declared war here or elsewhere?

(2) Recently these basic principles were reaffirmed and epitomized by this Court in the following classic language expressing the full essence of the American concept of Government confined by and to delegated, balanced and enumerated powers (*Höme Building Loan Association v. Blaisdell*, 290 U. S. 398, 425):

"Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency." (Italics ours.)

There is no room in our Constitution for power in one man, by his own pronouncement as to expediency, to suspend the Constitution or any part of it, to endow himself with so-called "residual power," to create or abrogate "due process of law," and to exclude the Judicial Power from discharge of its supreme and exclusive jurisdiction over "all Cases, in Law and Equity arising under this Constitution, the Laws of the United States,

and Treaties made, or which shall be made, under their Authority" (Article VI, Sec. 1).

These basic verities lie at the threshold of numerous constitutional provisions which invalidate the actions and threatened actions of the appellant in this case.

Provision "for the Common Defense and the General Welfare"

The Preamble to the Constitution of the United States includes among the stated objects the purposes to "provide for the common defense, promote the general Welfare and secure the Blessings of Liberty to ourselves and our Posterity."

But these purposes are not left floating unanchored among the three established Branches of the Government, or relegated to any "residual" and undefined prerogative of the Executive. *On the contrary, they are expressly reposed in the enumerated powers of the Legislative Branch, which is the spokesman of the people.*

Subdivision 1 of Section 8 of Article I of the Constitution includes among "The General Powers of Congress" the exclusive assertion that "Congress shall have power * * * to provide for the common Defense and general Welfare of the United States"; and subdivision 18 of the same Section implements that delegation by the further provision that

"The Congress shall have power * * * to make all laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof."

In other words, the power to provide for the Common Defense and General Welfare of the United States is not

an inherent or implied residual power of the Executive but is expressly delegated to Congress and can be carried "*into Execution*" only through laws which Congress shall deem "necessary and proper" for the purpose.

The sole duty and power of the Executive is to function in the execution of such laws,—not to create them, or to replace or supersede the power and duty of Congress to provide and enact them.

The exclusive legislative power of Congress

Section 1 of Article I of the Constitution immediately follows the Preamble. It carries the heading "Legislative Powers vested in Congress"; and it declares

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

The words "herein granted" obviously refer to the Constitution as a whole; and this necessary interpretation is confirmed by the fact that no "Legislative Powers" are therein granted to either the Executive or the Judiciary, and by the further fact that the Constitution itself reserves to the States and to the people all powers "not delegated to the United States by the Constitution, nor prohibited by it to the States."

The function of the Executive is to "take Care that the Laws be faithfully executed" (Art. II, Sec. 3),—not to create the laws for the enforcement of which he shall "take care".

The Founding Fathers were united in drawing from history the lesson that the progeny of any union of legislative and executive power was tyranny.

"Due process of law" is a legislative and judicial subject

The power to create "due process of law" is a legislative power and the power to determine "due process of law" is a judicial power.

If the power of "carrying into Execution" the laws created by the legislative power implied or included as inherent either the power to create due process of law or to dispense with it, then there would be no meaning in the provision in Article VI of the Constitution that

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."

In such an event, "due process of law" would mean anything or nothing, according to the will of the Executive; and the Bill of Rights and its respective guarantees of individual liberty would all be within the protection of the Judicial Power only by grace of the Executive.

The Executive's relation to "due process of law" is solely that of assistance to the Legislative and Judicial Powers.

The guarantee of "due process of law" is more than an invocation of the Legislative and the Judicial Powers.

It is also a roadblock against the Executive,—an unbreachable bulwark for the complete protection of life, liberty and property, against government by personal prerogative rather than by impersonal law. It is the freeman's castle erected by the Constitution within which every individual may be secure for himself, his posterity, his goods, his immunities, and his enjoyment of "the Blessings of Liberty" to which the Constitution is dedicated by its Preamble.

This ancient rampart against executive prerogative and government by personal edict was nearly 600 years old when, at the instance of the Founding Fathers, the States adopted it in 1791 as an embodiment of the provision in Article 39 of Magna Carta that

"No freeman shall be taken or imprisoned, or *disseized* or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him, *unless by the lawful judgment of his peers, or by the law of the land.*" (Italics ours.)

From that ancient day to this it has been a basic principle of Anglo-Saxon law and tradition (to quote *Case of Proclamations*, 12 Coke's Reports 74) that

"The King hath no prerogative, but that which the law of the land allows him."

This constitutional guarantee of "due process of law" is one which the Executive is not only bound by Section 3 of Article II of the Constitution and by his constitutional oath of office to "preserve, protect and defend" (Art. II, Sec. 7), but it places upon him the affirmative duty of aiding and not obstructing both the Legislative and Judicial Powers in the preservation, protection and defense of that high right and immunity possessed by every individual in our country, whether great or small.

As said by Chief Justice Taney in *Ex parte Merryman*, 17 Fed. Cas. 144 (decided in 1861) at p. 149:

"With such provisions in the constitution, expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus, or the arrest of a citizen, *except in aid of the judicial power.* He certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ

of habeas corpus, and the judicial power also, by arresting and imprisoning a person without due process of law." (Italics ours.)

Hence it was that the Founding Fathers included "life, liberty and the pursuit of happiness" among the "certain unalienable rights" which all men possess by endowment, not from the State but from "their Creator"; and also included in their denunciations of the "repeated injuries and usurpations practiced against the people of these Colonies by the King of Great Britain in combination with others", an arraignment

"For suspending our own legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever."

In the Preamble of 1789 to the Bill of Rights, there was a recital that the enumerated guarantees therein were directed against encroachment by the "*government*",—not against the Legislative or Judicial Branches only. The Preamble expressly said:

"The conventions of a number of the states having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or *abuse of its powers*, that further declaratory and restrictive clauses should be added and as extending the ground of public confidence *in the government* will best insure the beneficent ends of its institution." (Italics ours.)

Thus, these "further declaratory and restrictive clauses" were enacted for the very purpose of removing any possibility of misconstruction, whereby doctrines of residual or inherent power, or of royal prerogative, or of personal government or unlimited power, could by any possibility of interpretation, paraphrase or encroachment become superimposed upon the Constitution and thereby cause a loss "of public confidence in the government."

**The power to provide, support and maintain
armies and a navy**

Although Subdivision 1 of Section 2 of Article II of the Constitution declares that "The President shall be Commander-in-Chief of the Army and Navy of the United States", nevertheless the power to declare war and to provide, support and maintain armies and a navy are, by subdivisions 11, 12 and 13 of Section 8 of Article I of the Constitution, delegated exclusively to the Congress. The Executive can participate in these powers only in so far as the Congress, by express legislation, so provides.

The President cannot by confiscating private funds take from Congress the effective and exclusive control of "the purse strings", or its exclusive power to control policy by fixing and limiting appropriations (Article I Sections 7, 8 and 9).

The Executive Order of April 8, 1952, neither specifies nor relies on any such legislation. It is, in its essence, a stark assertion by the Executive of powers to raise and support armies and to provide and maintain a navy not under powers, provisions and appropriations enacted by the Congress but under some undefined "residuum of powers" residing in himself,—and to provide such support and maintenance not out of the public funds of the United States or out of moneys appropriated by Congress *but out of private properties and funds expropriated, committed and expended by himself for the purpose and for such duration of time and to such extent and on such terms and conditions as he shall see fit.*

Moreover, such private funds so expropriated by Presidential edict are handed over, not to the Army or to the Navy but to various individuals who are not enrolled in the Armed Forces or as a Militia and who are not subject

to his military orders in his capacity as "Commander-in-Chief of the Army and the Navy".

All this adds up to naked confiscation by personal decree. It offends every provision and instinct of the Constitution and of the Bill of Rights.

The President is "Commander-in-Chief of the Army and Navy of the United States", but he is ~~not~~ Commander-in-Chief of *the People* of the United States!

The duty to "take Care that the Laws be faithfully executed"

These words concerning the President in Section 3 of Article II of the Constitution are words of limitation, not of enlargement. Much less are they words of exemption from the limitations of the delegated, distributed and balanced powers.

These words place the President under the laws and not above them. They make him the agency for the enforcement of the laws enacted by Congress in furtherance of its possession of "all legislative powers".

Not even in England is the Crown exempted from the limitations imposed by the very name and definition of executive power, or can the Crown's acts be rendered legal upon the plea of the King's commands or state necessity.

In *Eastern Trust Co. v. McKenzie, Mann & Co., Ltd.* (1915 A. C. 750) the court made the following declaration, quoted in Halsbury's Laws of England, 2d Ed., p. 455, footnote (p. 759):

"It is the duty of the Crown and of every branch of the Executive to abide by and obey the law. If there is any difficulty in ascertaining it, Courts are open to the Crown to sue and it is the duty of the Executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it." (Italics ours.)

The same textbook by Halsbury states this constitutional principle in the following equivalent language directly pertinent to the present case (p. 455):

"Claims made by the Crown cannot be supported by mere pretence of prerogative, since the Courts have power to determine the extent and the legality or otherwise of any alleged prerogative; *nor may illegal acts be rendered justifiable by the plea of the King's commands, or State necessity.* The Crown is bound to observe the law both by statute and the terms of the coronation oath, which embodies the contract between the Crown and people upon which the title to the Crown originally depended, and still in large measure depends." (Italics ours.)

The same conception of the Executive as the servant and not the master of the law and as limited to the enforcement of the law and as not himself exempted from the law, is fundamental to our own Constitution. As said in *United States v. Lee*, 106 U. S. 196, 220:

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives."

**The reservation of residual powers to the States
and to the People**

Amendments IX and X ordain that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"; and that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Here, in these two amendments and nowhere else in the Constitution and the Bill of Rights, is there recognition of "residual power" or "residuum of power". These two Amendments flatly exclude the hypothesis of plenary or residual power delegated to any branch of the Federal Government or as possessed by it *sub silentio*.

Hence, what is not expressly delegated is not given at all, but is exclusively reserved to the only source from which all the delegations themselves came, to wit: the States and the people themselves.

The Constitution is a compact between that supreme source of power and the agencies created thereby; and what is not given is withheld. All the branches of Government are, according to our most sacred documents, conceived of as "deriving their just powers from the consent of the governed" and as existing not to create power but to secure the unalienable rights with which all men are endowed not by the State but by their Creator.

Powers which Government does not derive from the consent of the governed, it does not possess at all.

The foregoing constitutional restrictions are the more applicable because the Congress had already provided various statutory means for dealing with the emergency.

We appreciate that the Taft-Hartley Act may be distasteful to the Executive because it was enacted over his veto.

Nevertheless, it was and is part of the laws of the land which, under the Constitution, the Congress had provided for the protection of the common defense and the general welfare in the presence of emergency, and for the faithful execution of which it was his constitutional duty to "take care."

Even if the Executive possessed such "residual power" as is now claimed, such power would by its own terminology be excluded from exercise and cease to be "residual" whenever the Congress made statutory provision for meeting the emergency and thus defined the public policy and provided the procedure to be followed. The Executive would then be bound by express mandates in the Constitution and by its very structure to proceed according to the laws provided by the law-making power, and could not clothe himself with independent plenary power by self-assertion that his own ignoring of the statutory provisions created a vacuum and thus left him no other choice. (Opinion of Chief Justice Marshall in *The Flying Fish*, 2 Cranch [6 U. S.] 170, 176; and the opinion of Mr. Justice Story in *United States vs. The Franklin*, 18 Fed. Cas., p. 830.)

In point of fact, the Congress had already provided various methods and procedures for dealing with the problems of protecting the national defense and the general welfare through seizures of productive facilities essential thereto if the necessary materials were not forthcoming (United States Military Training and Service Act, 50 U. S. C. A. Appendix, 468; Defense Production Act of 1950,

50 U. S. C. A. Appendix 2081(b)); and for dealing with strikes or threatened strikes impairing the national health or safety (Labor Management Relations Act of 1947, 29 U. S. C. A. 176-178). In this last Act, the Congress had specifically rejected seizure of private property of citizens in emergency situations created by labor disputes. (See statements of Senator Taft, Congressional Record, April 23, 1947; Representative Case, Congressional Record, March 13, 1947, *Legislative History of Labor Management Relations Act*, Vols. 1 and 2, pp. 577, 832, 833 and 1009, United States Printing Office 1948).

Moreover, this Act was conceived during the great emergency when the Stalinist menace of political strikes and sabotage was before Congress (see *Communications Ass'n. v. Douds*, 339 U. S. 382); and, indeed, it was the same Congress which gave the Marshall Plan legislative expression.

Where Congress has repeatedly considered the threat to the general welfare which strikes may present during a national emergency and has provided means and procedures for dealing with them, the President is not at liberty to reject the means with which Congress has equipped him and create for himself other measures more to his taste or to his conception of what should be done. His constitutional duty to faithfully execute the laws excludes any lawful power to ignore or disobey them, *or to veto them by indirection.*

POINT I

The predicates of power, implicit in the appellant's actions taken and to be taken, reverse the established principles of constitutional government and endow the Executive with a personal power over liberty and property, both undefined, unlimited and beyond existing constitutional restraints.

The arguments advanced for these predicates lead to the elevation of the Executive above the Congress and the Judiciary; to the concept that the Executive, rather than the States and the People themselves, is the repository of the residuum of power; and to the ultimate result that rule by law loses all substance, and the country and all its people can pass into the hands of one man.

The contentions advanced for the appellant, when carried to their logical and inevitable conclusion, present this looming reflection of absolutism:

If the powers which the President seeks to exercise, and the appellant's attorney to justify, are in fact exercisable by him alone, without the aid of statute, then there is neither need nor room for the existence or functions of Congress or the Courts, because the President alone, by executive decree and reference to himself as Commander-in-Chief of the Army and Navy, can assume and exercise the power and force to seize private property and whole industries, and, by the same token, manpower; to draft manpower and mobilize the public and private economy; to fix prices; to exercise the legislative and judicial power of eminent domain; to use private funds to pay such wages

and salaries and to defray such expenses as he might determine; to create or dispense with bills of appropriation; to create or dispense with due process of law; dispense with judicial procedure and jury trial; and to extend to all his agents immunity from judicial process.

In short, he could make himself just what the appellant's brief below (p. 27) has already styled him—"the Chief of State". He would be the Commander-in-Chief not merely of the Army and Navy but of the American people.

Little or nothing would be left of our present constitutional system or structure.

(1) The Constitution vests in the Congress alone the power "to declare war", Art. I, Sec. 8, clause 11. But a declaration by the President of an emergency of the character here claimed, and of his assumption of alleged powers as wartime Commander-in-Chief of the Army and Navy, is the equivalent of a declaration by the President of such a state of war in our country that he claims to empower himself to seize, impress, suspend and draft according to his conception of the requirements of the emergency.

The assertion that actions taken under such a Presidential declaration are not even justiciable, runs counter to principles of Constitutional law established by this Court from its earliest day:

Little v. Bareme, 2 Cranch. 170;

Ex parte Milligan, 4 Wall. 2;

Mitchell v. Harmony, 13 How. 115;

Duncan v. Kahanamoku, 327 U. S. 304.

Cf.: *Sterling v. Constantin*, 287 U. S. 378;

The Orono, 18 Fed. Cas. 830;

Gelston v. Hoyt, 3 Wheat. 246;

Filbin Corp. v. United States, 266 F. 911, 916-7.

Even where Congress has acted under the war powers, its action is open to judicial inquiry:

Woods v. Miller, 333 U. S. 138, 144;

Dennis v. United States, 341 U. S. 494, 511 et seq.,
and views of Jackson, J., concurring, at p. 567,
and Douglas, J., dissenting, at p. 587;

Habisiades v. Shaughnessy, 342 U. S. 580;

Filbin Corp. v. United States, 266 F. 911, 916-7.

"In the absence of express constitutional or congressional authorization" (*Muir v. Louisville & N. R. R.*, 247 Fed. 888), Presidential proclamations have no effect as laws, *Toledo, P. & W. R. R. v. Stover*, 60 F. Supp. 587, Black, *Constitutional Law*, 3 ed., Sec. 82, pp. 135-136.

(2) If the President's Executive Order is not subject to judicial scrutiny, then the President, claiming to act in emergency as Commander-in-Chief of the Army and Navy, may, by naked force, seize the property and persons of any individual without other regard for the Bill of Rights than his own choice.

This is graphically illustrated in the classic case of *Ex parte Merryman*, 17 Fed. Cases 152. There, after deciding that a petitioner held by the military should be released, Chief Justice Taney (sitting on circuit) said:

"These great and fundamental laws, which congress itself could not suspend, have been disregarded and suspended, like the writ of habeas corpus, by a military order, supported by force of arms. Such is the case now before me, and I can only say that if the authority which the constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power at its discretion, the people of the United States are no longer living under

a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.

"In such a case, my duty was too plain to be mistaken. I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome."

(3) The power to take private property by eminent domain is exclusively a legislative power:

18 Am. Jur., Eminent Domain, Sec. 9;

United States v. Acres of Land, 22 F. Supp. 1017;

Hooe v. United States, 218 U. S. 322;

United States v. North American Co., 253 U. S. 330, 333.

Yet it is this power which the Executive Order attempts to wield.

(4) The power to conscript is vested exclusively in Congress under its power, Art. I, Sec. 8, Clause 12, "To raise and support armies":

United States v. Newman, 44 F. Supp. 817, 822 (E. D. Ill., 1942);

United States v. Cornell, 36 F. Supp. 81, 83 (S. D., Idaho, 1940).

To impress labor and management into the involuntary service of the government by executive fiat alone also violates the Thirteenth Amendment to the Constitution which binds both the Federal Government, the States and individuals. See *United States v. Gashin*, 320 U. S. 527.

This power, were it to exist, could be used to strangle organized labor itself. Under it, the President could seize the unions, their property and funds, by mere executive decree. Given a differently minded President, such a power could be used to accomplish the "involuntary servitude" which the Thirteenth Amendment forbids.

(5) Were the President to possess the powers claimed, his Executive Order might likewise direct the manpower so drafted not to strike. The power claimed would therefore give him the judicial power of injunction.

Not only could he prohibit concerted action by labor, but also he could prevent a single worker from leaving the government service. Apart from its complete unconstitutionality, the President by his order might nullify at will the prohibitions against injunctions embodied in the Norris-LaGuardia and Taft-Hartley Acts for the protection of labor.

By the same Executive Order he might make punishable any interference, whether by labor or management, with his operation of the industry. Yet it has heretofore been deemed settled that the Executive possesses no power to make violations of his orders or regulations a crime, or to dispense with trial by jury. (*United States v. Eaton*, 144 U. S. 677; *United States v. George*, 228 U. S. 14, 22.)

(6) Art. IV; Sec. 3, Clause 2, of the Constitution provides that, "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting * * * Property belonging to the United States * * *."

This clause applies to *all* property, real and personal, of the United States (*Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 331), and this exclusive consti-

tutional grant of power to Congress may not be encroached upon either by the executive or the courts (*United States v. California*, 332 U. S. 19). The appellant, under the aegis of the President's Executive Order, purports to vest in himself for such time as he shall deem expedient "all real and personal property, franchises, funds and other assets" of these and the other respondents.

The purported taking of respondents' property here demonstrates both the basic illegality of the taking itself and also the illegality of the appellant's efforts and threats to fix according to his will "the terms and conditions of employment" in the respondents' plants.

The illegality of the taking is plain because any action designed to place private property under the Government and place its supervision and control, even temporarily, in its hands, requires specific Congressional legislation with respect to such operation and disposition. The exclusive Congressional power to dispose of and regulate government property (which Congress has refused to exercise in this case) extends to *all* of the property so seized and the manpower so impressed and could alone be the warrant and justification for fixing the prices of the steel so seized and the wages and salaries of the employees so drafted. This constitutional power of Congress the Executive Order unlawfully exercises.

Also unlawfully exercised thereby is the implied exclusive Constitutional power of Congress to fix the wages, terms and conditions of employment of Government employees (*Cochinower v. United States*, 248 U. S. 405). There the Court said that fixing the compensation of Federal officers and employees (p. 407) "is a legislative function" and "the delegation of such function must have clear expression or implication." See *Glavey v. United States*, 182 U. S. 595.

Thus the appellant's proposed action to grant and fix the increased wage and the working conditions violates that Congressional constitutional power also.

(7) The seizure being illegal, use of respondents' property and funds is an executive confiscation of private property in violation of the Fourth and Fifth Amendments to the Constitution.

Viewed as an attempt to vest such property and funds in the Government and to expend them, it is an executive misappropriation of government funds, and on that theory violates Art. I, Sec. 9, Clause 7 and Sec. 8, Clause 1, of the Constitution which confer on Congress exclusively the power to make appropriations of government moneys and the power to pay the debts of the United States.

(8) The Constitution entrusts to Congress exclusively the power to "provide for the common Defense and general Welfare of the United States * * * to declare War * * * to raise and support Armies * * * to provide and maintain a Navy * * * to make Rules for the Government and Regulation of the land and naval Forces * * * to provide for calling forth the Militia * * *" (Art. I, Sec. 8). See *Ex parte Quirin*, 317 U. S. 1; *Hirabayashi v. United States*, 320 U. S. 81.

The distinction between the powers of the President as Commander-in-Chief and of the Congress to provide for the common defense is made abundantly clear by the court in *O'Neal v. United States*, 140 F. 2d 908, 911 (C. A. 6; 1944) cert. den. 322 U. S. 729:

"We think it is plain, and it is not contested that the power to allocate materials and facilities for defense and the power to control the price structure

under the Constitution of the United States is *legislative rather than executive*. While the war power in this country is conferred on the Congress and on the President, *Kiyoski Hirabayashi v. United States*, 320 U. S. 81, 93, 63 S. Ct. 1375, 87 L. Ed. 1774, the principal war power of the President arises as Commander-in-Chief of the Army and Navy and *does not include any war power legislative in its nature*. The President also is invested with certain war powers arising out of the treaty-making power, such as the duty of negotiating treaties with our Allies. However, the power to establish shortage rationing, and the power to fix prices upon the entire range of civilian goods is neither expressly nor impliedly included in any war power of the President. Such drastic power necessarily falls within the 'legislative power' with which the Congress is invested (Art. I, Section 1, U. S. Constitution)."

In fact, the court went on to say at page 912:

"In carrying out the constitutional division of the powers, it is a breach of the fundamental law for Congress to transfer its legislative power to the President. *Panama Refining Co. v. Ryan*, 293 U. S. 388, 421, 55 S. Ct. 241, 79 L. Ed. 446; *Di Santo v. United States*, 6 Cir., 93 F. 2d 948. However; the Congress in the field of its duties may invoke the action of the executive branch in so far as the action invoked is not an assumption of its own constitutional field of action."

The seizure and operation here for what is claimed to be defense production encroaches on the legislative power to provide the sinews of defense, to make and fix the appropriations and to control policy by controlling the purse strings; contrary to the principle laid down in the *Q'Neal* case and enforced by the court in *United States v. McFarland* 15 F. 2d 823 (C. A. 4, 1926), cert. granted 273 U. S. 688 and revoked 275 U. S. 485.

(9) The historic resistance by this Court to attempts by the Legislative, Judicial or the Executive Branches of the Government to transgress the constitutionally appointed limits on their powers has continued down to this day.

Both this Court and its individual members in recent opinions have vigorously restated their belief in the protections afforded by the Constitution against the vesting of arbitrary and absolute power in the hands of any Branch of the government or of the government as a whole:

"Even the Government,—the organ of the whole people—is restricted by the system of checks and balances established by our Constitution. The designers of that system distributed authority among the three branches 'not to promote efficiency but to preclude the exercise of arbitrary power.' Mr. Justice Brandeis, dissenting in *Myers v. United States*, 272 U. S. 52, 293. Their concern for individual members of society, for whose well-being government is instituted, gave urgency to the fear that concentrated power would become arbitrary. It is a fear that the history of such power, even when professedly employed for democratic purposes, has hardly rendered unfounded." Mr. Justice Frankfurter, concurring in *A. F. of L. v. American Sash Co.*, 335 U. S. 538, at 545.

"Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times, his privacy; at times, his liberty of movement; at times, his freedom of thought; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom

than any of man's other inventions." Mr. Justice Douglas dissenting in *United States v. Wunderlich*, 342 U. S. 98, at p. 101.

"It is said that the power here asserted is inherent in sovereignty. This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists. May the courts establish the boundaries? Whence do they obtain the authority for this? Shall they look to the practices of other nations to ascertain the limits? The governments of other nations have elastic powers—ours is fixed and bounded by a written constitution." Mr. Justice Douglas dissenting in *Harisiades v. Shaughnessy*, 342 U. S. 580, at pp. 599, 600.

"Power in a democracy implies responsibility in its exercise. No institution in a democracy, either governmental or private, can have absolute power. Nor can the limits of power which enforce responsibility be finally determined by the limited power itself. See Carl L. Becker, *Freedom and Responsibility in the American Way of Life* (1945)." Mr. Justice Frankfurter concurring in *Pennchamp v. Florida*, 328 U. S. 331, at pp. 355-356.

"The very first Article of the Constitution begins by saying that 'All legislative Powers herein granted shall be vested in a Congress' and no part of the Constitution contains a provision specifically authorizing the President to create courts to try American citizens. Whatever may be the scope of the President's power as Commander in Chief of the fighting armed forces, I think that if American citizens in present-day Germany are to be tried by the American Government, they should be tried under laws passed by Congress and in courts created by Congress under its constitutional authority." (Mr. Justice Black dissenting in *Madsen v. Kinsella*, 20 U. S. Law Week 4271, at p. 4280, April 28, 1951.)

POINT II

Where illegal actions, violative of the Bill of Rights and other prohibitions in the Constitution and in excess of constitutional power, are being taken by individuals claiming to act under direction of the Executive, the courts are not without power, and they have a constitutional duty, to declare void and to negate such actions.

The claim that such illegal and void actions are remedial only by suits for damages, is unsound, would render illusory the Bill of Rights and other constitutional restrictions, and would deprive the parties aggrieved of any effective, adequate or even enforceable remedy.

(1) Little can be added to Judge Pine's exposition of the jurisdiction of the Judicial Branch of the Government to negate actions by officers of the government which the courts determine to be in excess of constitutional power or violative of constitutional restrictions, even though such persons are acting or claim to be acting under the express order of the Executive.

If the Judicial Branch of the Government did not have this jurisdiction, it would be inferior to instead of coordinate with the Executive; and its supreme function as protector and warden of the Constitution and of the rights of the people and the States thereunder, would be impotent as regards action professing to be under direction of the Executive.

Hence, any contention that the courts are in this case without jurisdiction begs the question or assumes that

the actions taken and about to be taken by the defendant in accordance with the aforesaid announcements of April 8 and May 3, 1952, are not in excess of constitutional power or violative of constitutional prohibitions.

If such actions are of such illegal character, then any contention that the courts are without jurisdiction in this case must mean either (1) that the judicial power expressly conferred on this Court and on the inferior Federal courts by Article III and Section 2 of Article VI of the Constitution is not exercisable in the case of actions professing to be under direction of the Executive; or else (2) that the aggrieved person has no remedy in the Federal courts, no matter how grievous, continuous and annihilative the injury, other than a suit for damages against the individual trespasser,—a remedy the more illusory the greater the injury.

Hence the court below faced, and for jurisdictional purposes was obliged to face, the pivotal question whether or not such actions taken and to be taken by this appellant were in excess of constitutional power or contrary to constitutional prohibitions. Having found that such actions were of both these characters, the court below was obliged to find, and did find, that such actions were “beyond the officers’ powers and . . . therefore not the conduct of the sovereign”. (*Larson v. Domestic and Foreign Corp.*, 337 U. S. 682, 690.) In such eventuality, as stated in this *Larson* case, “the Court has repeatedly stated these to be cases in which such (*i. e.*, injunctive) relief could be granted” (p. 699).

And in this *Larson* case, in discussing this Court’s earlier decision in *United States v. Lee*, 106 U. S. 196, this Court further said (p. 697):

"The Court thus assumed that if title had been in the plaintiff the taking of the property by the defendants would be a taking without just compensation and, therefore, an unconstitutional action. On that assumption, and only on that assumption, the defendants' possession of the property was an unconstitutional use of their power and was, therefore, not validly authorized by the sovereign. *For that reason, a suit for specific relief, to obtain the property, was not a suit against the sovereign and could be maintained against the defendants as individuals.*" (Italics ours.)

(2) This is not a case where an injunction is sought against the *person* of the President. This Court, although repeatedly upholding injunctions against representatives of the Executive acting under unconstitutional statutes, has never felt that such a determination enjoined or restrained the Congress itself (*Massachusetts v. Mellon*, 262 U. S. 447, p. 488). And see discussion by Charles Warren, *Congress, The Constitution, and The Supreme Court*, pp. 252, 253.

Where a statute, even though approved by the Executive, has been judicially held unconstitutional, the issuance of an injunction or the invalidation of executive action thereunder is the normal corollary to such a holding.

As was said in *Massachusetts v. Mellon*, 262 U. S. 447, at p. 488:

"* * * If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding."

(3) Moreover, whatever may be the *personal* immunity of the President from suit, the cases are legion that this immunity does not extend to any subordinate officers of the

Executive Branch where they are acting beyond their authority either individually or under color of an unconstitutional statute or *Executive or Administrative order*.

The Orono, 18 Fed. Cas: 830, Cas. No. 10,585;

Brannan v. Stark, 342 U. S. 451;

Bailey v. Richardson, 341 U. S. 918, aff'g 182 F. 2d 46;

Anti-Fascist Committee v. McGrath, 341 U. S. 123;

Larson v. Domestic & Foreign Corp., 337 U. S. 682;

Goltra v. Weeks, 271 U. S. 536, 544-547;

Utah Fuel Co. v. Coal Comm., 306 U. S. 56, 59-60;

Ickes v. Fox, 300 U. S. 82, 96-97;

Sterling v. Constantin, *supra*;

Fleming v. Moberly Milk Products Co., 160 F. 2d 259, cert. denied, 331 U. S. 786;

Colorado v. Toll, 268 U. S. 228, 230-231;

Philadelphia Co. v. Stimson, 223 U. S. 605, 619;

School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 107-111;

Noble v. Union River Logging Railroad Co., 147 U. S. 165, 170-177;

Franklin Township v. Tugwell, 85 F. 2d 208 (C. A. D. C., 1936);

United States v. McFarland, 15 F. 2d 823 (C. A. 4, 1926), cert. granted 273 U. S. 688 and revoked 275 U. S. 485.

Furthermore, executive officers are punishable by contempt where they refuse to return citizens' property after a judicial determination of illegal seizure and retention (*Sawyer v. Dollar*, 190 F. 2d 623 [C. A. D. C.] 1951, cert. granted, 342 U. S. 875).

Accordingly, the cases cited by the Government in its brief below purporting to stand for the immunity of the Executive Branch from judicial process are irrelevant. They relate solely to executive action within the constitutional sphere of executive discretion and judgment.

Thus, in *Mississippi v. Johnson*, 4 Wall. 475, where the suit for mandatory injunction named the President *personally* as a defendant, this Court said (p. 501):

"We are fully satisfied that this Court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us."

Mr. Justice Frankfurter characterized the holding in that case, when announcing the judgment of this Court in *Colégrave v. Green*, 328 U. S. 549, as standing merely for the proposition that (p. 556):

"The duty to see to it that the laws are faithfully executed cannot be brought under legal compulsion, *Mississippi v. Johnson*, 4 Wall. 475."

Myers v. United States, 272 U. S. 52, upon which the appellant's counsel rely to support their "residual power" theory of the Presidency, has not only been directly overruled, in so far as it might support this novel doctrine, in *Humphrey's Executor v. United States*, 295 U. S. 602; but, also, the dissenting opinion of Mr. Justice Brandeis in the *Myers* case, denying the existence of residual inherent power in the Executive or in any Branch of the Government, has become approved doctrine. *Pennikamp v. Florida*, 328 U. S. 331, 356; *A. F. of L. v. American Sash Co.*, 335 U. S. 538, 545.

Cases of the type of *C & S Air Lines v. Waterman Corp.*, 333 U. S. 103, also relied on by the appellant's

counsel, stand merely for the proposition that in the field of foreign affairs where the Constitution gives express and exclusive power to the Executive, this Court will not interfere. Conversely, the powers here sought to be exercised by the Executive Order and by this appellant have been expressly entrusted by the Constitution to Congress alone. (Article I, Sec. 8.)

(4) In the course of its opinion the District Court stated (R. 74):

"I first find as a fact, on the showing made * * * that the damages are irreparable."

Obviously, the damages entailed by depriving the respondents of their common law and statutory right of collective bargaining, and by the imposition of a wage rise, new working hours and conditions and a possible union shop would be incalculable and staggering. Since the seizure and such impositions are illegal, the respondents' only possible recourse for damages would be against the officers responsible therefor. No one individual could possibly respond in monetary damage for the purely financial losses thereby entailed, even if they could be calculated and determined.

(5) The contention of the appellant's counsel that plaintiffs would have a claim against the United States founded upon the Constitution and cognizable in the Court of Claims, 28 U. S. C. 1491(1) is irrelevant and also without substance.

United States v. Causby, 328 U. S. 256, did not involve a tortious act of taking by an executive officer acting without statutory authority and in violation of constitutional prohibitions. In *United States v. Pewee Coal*, 341

U. S. 119, cited by the appellant's counsel below, the issue of the legality of the seizure was neither raised nor considered by the courts. See *Id.*, 88 F. Supp. 426, at 429-430 (Ct. Cls., 1950).

This Court has said that the question of whether federal courts can grant money damages suffered as a result of a violation by a federal officer of the Fifth Amendment "has never been specifically decided by this Court." (*Bell v. Hood*, 327 U. S. 678, at p. 684.) But in that case Mr. Justice Black, who delivered the opinion of this Court, said that " * * * it is established practice for this Court to sustain the jurisdiction of federal courts to issue *injunctions* to protect rights safeguarded by the Constitution" (p. 684),—citing *Philadelphia Co. v. Stimson*, 223 U. S. 605. The Court went on to state (p. 684):

"Moreover, where federally protected rights have been invaded it has been the rule from the beginning that courts will be alert to adjust their remedy so as to grant the necessary relief."

(6) That equitable relief is necessary where the act sought to be enjoined is—as in this case—a continuing trespass for such period of time as the trespasser may choose, is inherent in the very doctrine upon which courts issue injunctions to prevent the commission of continuing torts. (Vol. 4 Pomeroy's *Equity Jurisprudence*, Fifth Ed., Sec. 1357): There the author says:

" * * * the ultimate criterion is the inadequacy of the legal remedy. The legal remedy is not adequate simply because a recovery of pecuniary damages is possible. It is only adequate when the injured party can, by one action at law recover damages which constitute a complete and certain relief for the whole wrong,—a relief virtually as efficient as that given by a court of equity."

In no event, even if there existed a right to recover damages against the Government, would such a remedy be adequate. As said in *Osborne v. Missouri Pacific Railway Co.*, 147 U. S. 248, 258:

"Equitable jurisdiction may be invoked in view of the inadequacy of the legal remedy where the injury is destructive or of a continuous character or irreparable in its nature; and the appropriation of private property to public use, under color of law, but in fact without authority, is such an invasion of private rights as may be assumed to be essentially irremediable, if, indeed, relief may not be awarded *ex debito justitiae*." (Italics ours.)

Also, this Court said in *Carter v. Carter Coal Co.*, 298 U. S. 238, 288, quoting from *Pennsylvania v. West Virginia*, 262 U. S. 553:

"One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough."

(7) Nor do the respondents have a remedy against the Government under the Federal Tort Claims Act.

28 U. S. C. A. 2680 *excludes* claims against the Government which are founded upon an act or omission of a Government employee in the exercise of due care under a statute or regulation whether or not the same be valid, or in the performance of a discretionary function whether or not the discretion involved was abused.

Plainly the Executive Order relied on here as authority for the appellant's action is a regulation within the meaning of Section 2680:

Old King Coal Co. v. United States, 88 F. Supp. 124 (S. D. Iowa 1949);

Jones v. United States, 89 F. Supp. 980 (S. D. Iowa 1949);

Lauterbach v. United States, 95 F. Supp. 479 (W. D. Wash. 1951);

Toledo v. United States, 95 F. Supp. 838 (D. P. R. 1951);

Boyce v. United States, 93 F. Supp. 866 (S. D. Iowa 1950);

J. B. McCrary Co., Inc. v. United States, 84 F. Supp. 368 (Ct. Cls. 1949).

Furthermore, under 28 U. S. C. A. §1346(b), the United States can be held liable under the Tort Claims Act *only* where "a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Since no private person has the power to perform the acts here taken and to be taken the United States could not be held liable under that Act. (*Feres v. United States*, 340 U. S. 135, 141-2.)

Summary

At the outset of this Brief, we emphasized the utmost gravity of the issues here involved.

We conclude this Brief by adopting as our summary the following from *George Washington's Farewell Address*:

"If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment

in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield."

CONCLUSION

The order of the District Court enjoining the appellant from proceeding further with the actions taken and to be taken should be affirmed.

Respectfully submitted,

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NO. 744

Office - Supreme Court, U. S.

FILED

MAY 2 1952

CHARLES ELMORE CROLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1951

**THE YOUNGSTOWN SHEET AND TUBE COMPANY,
ET AL., *Petitioners***

V.

CHARLES SAWYER

**On Petition for a Writ of Certiorari to the United States Court
of Appeals for the District of Columbia Circuit**

MEMORANDUM ON BEHALF OF RESPONDENT

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THE YOUNGSTOWN SHEET AND TUBE COMPANY,
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v.

CHARLES SAWYER

On Petition for a Writ of Certiorari to the United States Court
of Appeals for the District of Columbia Circuit

MEMORANDUM ON BEHALF OF RESPONDENT

Respondent has filed a petition for certiorari in this case seeking review of the same judgments which petitioners here seek to review. No. 745, October Term, 1951. Accordingly, respondent has no objection to the granting of the present petition.

We have annexed to our petition in No. 745 an application for continuance of the stay heretofore granted by the Court of Appeals. We there point out that in the event the writ is granted, a further stay by this Court will be necessary. The

plaintiffs (petitioners here) argue at some length (pp. 9-14) that in the event this Court should continue the stay granted by the Court of Appeals, it should modify its terms so as to include an injunction against the Secretary of Commerce restraining him from putting into effect any changes in the terms and conditions of employment.

We are informed that Mr. Philip Murray, president of the United Steel Workers of America, C.I.O., has this morning ordered the steel workers back to work, and that the workers are returning to work. Accordingly, it would appear that the interruption of vitally needed steel production, which was averted by the President's Executive Order but which then began immediately after the filing of Judge Pine's opinion, is over and production is being resumed. Any change in the nature of the stay now in effect would probably result in a new crisis, with danger of still another interruption. Accordingly, we earnestly urge that the stay granted by the Court of Appeals be continued without change by this Court. 3

We wish to point out that plaintiffs are renewing an attempt which was unsuccessful in both courts below. In the District Court, the United States Steel Corporation orally amended its application for a preliminary injunction so as to request merely an injunction restraining the Secretary of Commerce from making any changes in the terms and conditions of employment, without

at that time nullifying the seizure or passing upon its validity. That request was rejected by the District Court. On the afternoon of April 30, 1952, an application for stay was presented to the Court of Appeals *en banc* by the defendant in these cases and the matter was argued for several hours. During the course of the argument, it was vigorously urged by several of counsel for the plaintiffs that if any stay were issued the order should restrain the Secretary of Commerce from putting into effect changes in terms and conditions of employment. Any such limitation was opposed by counsel for the defendant and the court entered a stay order which contained no such limitation. On the morning of May 1, 1952, counsel for the plaintiffs presented a further application requesting such a modification of the stay issued the previous evening. The matter was again argued, most extensively, before the entire court *en banc* and the proposed modification of the stay was denied.

In the event that any departure from the terms of stay approved by the Court of Appeals should be considered by this Court, we request the privilege of a hearing.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

MAY, 1952.

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No. 745

In the Supreme Court of the United States

OCTOBER TERM, 1951

CHARLES SAWYER, SECRETARY OF COMMERCE,
PETITIONER

v.

THE YOUNGSTOWN SHEET AND TUBE COMPANY,
ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT AND APPLICA-
TION FOR STAY

INDEX

	Page
Petition for Writ of Certiorari	1
Opinion below	1
Jurisdiction	2
Questions presented	2
Constitutional provisions and Executive Order involved	2
Statement	4
Reasons for granting the writ	17
Application for continuation of stay	31
Appendix	33

CITATIONS

Cases:

<i>Alexander v. United States</i> , 39 C. Cls. 383	26
<i>Alma Motor Co. v. Timken Co.</i> , 329 U. S. 129	18
<i>Alpirn v. Huffman</i> , 49 F. Supp. 337	26
<i>Carter v. Carter Coal Co.</i> , 298 U.S. 238	28
<i>Dakota Coal Co. v. Fraser</i> , 283 Fed. 415, vacated on appeal as moot, 267 Fed. 130	26, 27
<i>Debs, In re</i> , 158 U.S. 564	23
<i>Employers Group of Motor Freight Carriers, Inc., et al. v. National War Labor Board</i> , 143 F. 2d 145, certiorari denied, 323 U.S. 735	26
<i>Federation of Labor v. McAdory</i> , 325 U.S. 450	27
<i>Gold Clause Cases</i> , 294 U.S. 240	22
<i>Harrisonville v. Dickey Clay Co.</i> , 289 U. S. 334	18
<i>Hirabayashi v. United States</i> , 320 U.S. 81	21
<i>Holzendorf v. Hay</i> , 20 App. D.C. 576, writ of error dismissed, 194 U.S. 373	27
<i>Hood & Sons, Inc. v. United States</i> , 307 U.S. 588	28
<i>Hurley v. Kincaid</i> , 285 U.S. 95	21
<i>Inland Waterways Corp. v. Young</i> , 309 U.S. 517	24
<i>Ken-Rad Tube and Lamp Corp. v. Badesu</i> , 55 F. Supp. 193	26
<i>Kohl v. United States</i> , 91 U.S. 367	21
<i>Mayo v. Canning Co.</i> , 309 U.S. 310	18
<i>Mississippi v. Johnson</i> , 4 Wall. 475	27
<i>Myers v. United States</i> , 272 U. S. 52	24
<i>Norman v. Baltimore & Ohio R. Co.</i> , 294 U.S. 240	28
<i>Portsmouth Co. v. United States</i> , 260 U.S. 327	21
<i>Quirin, Ex parte</i> , 317 U.S. 1	28
<i>Railroad Retirement Board v. Alton Railroad Co.</i> , 295 U.S. 330	28
<i>Rescue Army v. Municipal Court</i> , 331 U.S. 549	18
<i>Rickert Rice Mills, Inc. v. Fontenot</i> , 297 U.S. 110	28
<i>Roxford Knitting Co. v. Moore & Tierney</i> , 265 Fed. 177	26
<i>State ex rel. Burnquist v. District Court</i> , 141 Minn. 1	27

Cases—Continued

	Page
<i>Trial of Thomas Cooper</i> , Wharton's State Trials of the United States, pp. 569, 662	27
<i>United States v. Causby</i> , 328 U. S. 256	21
<i>United States v. Midwest Oil Co.</i> , 236 U.S. 459	24
<i>United States v. Mine Workers</i> , 330 U.S. 258	28, 30
<i>United States v. Pacific Railroad</i> , 120 U.S. 227	26
<i>United States v. Pewee Coal Co.</i> , 341 U. S. 114	21, 26
<i>United States v. Russell</i> , 13 Wall. 623	26
<i>Yakus v. United States</i> , 321 U.S. 414	18, 22

Constitution of the United States and Statutes:

Art. II:

Sec. 1	2, 20
2	3, 20
3	4, 20

Fifth Amendment

23	4, 21
Labor Management Relations Act, 61 Stat. 136, 29 U.S.C. (Supp. IV) 141, <i>et seq.</i>	20
War Labor Disputes Act of 1943, 57 Stat. 163, 50 U.S.C. App. 1501-1511	23, 24

Miscellaneous:

Baker, Woodrow Wilson, <i>Life & Letter, Armistice</i> (1939), vol. 8, pp. 401-402	23
Cong. Globe, 37 Cong., 2d Sess., 509, 510, 512, 516, 520, 548	25
87 Cong. Rec. 5895, 5901, 5910, 5972, 5974, 5975	25
89 Cong. Rec. 3807	25
89 Cong. Rec. 3807, 3885, 3886, 3887, 3896, 3989, 3992, 3993	25
Executive Order 8773	23
Executive Orders 8773, 8868, 8928, 8944, 9108, 9141, 9220, 9225, 9254, 9340, 9341, 9351, 6 F.R. 2777, 4349, 5559, 5947, 7 F.R. 2201, 2961, 6413, 6627, 8333, 8 F.R. 5695, 6323, 8097	23
Executive Order 10233, 16 F. R. 3503	5
Executive Order No. 10340, 17 F. R. 3139, issued on April 8, 1952	4, 5, 8, 15, 22, 33
39 Op. A.G. 347-348	23
40 Op. A.G. 319-320	23
Order No. 1 of the Secretary of Commerce	4, 7, 45
President's Message to Congress of April 9, 1952, House Doc. 422, 82d Cong., 2d Sess., 98 Cong. Rec. 3962	19
Rule 39 of the United States Supreme Court	28
Statement by Attorney General Jackson, New York Times, June 10, 1941, p. 16	23
War of the Rebellion, Official Records of the Union and Confederate Armies, Series I, v. II, p. 603	23

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PETITION FOR A WRIT OF CERTIORARI TO THE
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DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of Charles Sawyer, Secretary of Commerce, respectfully prays that a writ of certiorari issue to review the orders of the United States District Court for the District of Columbia entered in the above-entitled cases on April 30, 1952, which cases are now pending in the United States Court of Appeals for the District of Columbia Circuit on appeals by the petitioner.

OPINION BELOW

The opinion of the District Court (R. 77) is not yet reported.

JURISDICTION

The orders of the District Court were entered on April 30, 1952 (R. 87). On April 30, 1952, the petitioner docketed its appeals with the Court of Appeals for the District of Columbia Circuit. The cases have not been heard, submitted to, or decided by the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, on the facts recited in the Executive Order and established by the uncontroverted affidavits, the President had constitutional authority to take possession of respondents' steel mills in order to avert an imminent nation-wide cessation of steel production.

2. Whether, in the circumstances of this case, the district court erred in reaching and deciding the constitutional issues on motions for preliminary injunctions.

3. Whether the district court erred in granting injunctive relief.

CONSTITUTIONAL PROVISIONS AND EXECUTIVE ORDER INVOLVED

Article II of the Constitution provides, in pertinent part:

SECTION 1. The executive Power shall be vested in a President of the United States of America. * * *

* * * * *

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the Presi-

4

dent alone, in the Courts of Law, or in the Heads of Departments.

* * * * *

SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

* * * * *

The Fifth Amendment provides:

No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Executive Order No. 10340, and Order No. 1 of the Secretary of Commerce are set out in Appendix A hereto.

STATEMENT

These are proceedings for injunctive relief against the petitioner, the Secretary of Commerce, to restrain through him the action of the President

in ordering the taking of possession and operation of certain of respondents' properties by Executive Order 10340, 17 F.R. 3139, issued on April 8, 1952 (R. 5).^{*} The events which led to the issuance of the Executive Order and the proceedings below are as follows:

1. *Events leading to the issuance of the Executive Order.*—On November 1, 1951, respondents' employees, represented by the United Steelworkers of America, C.I.O., which had a collective bargaining agreement due to expire on December 31, 1951, gave notice to the respondents that they wished in a proposed new collective bargaining agreement between the parties to effect changes in wages and working conditions over those established by the old contract (R. 2). No progress was made in the negotiations which followed and, on December 22, 1951, the dispute was referred by the President to the Wage Stabilization Board, in accordance with the provisions of Executive Order 10233, 16 F.R. 3503 (R. 47). The Presidential letter of referral, a copy of which is attached to the affidavit of Mr. Harry Weiss, Executive Director of

^{*} Ten complaints were filed and ten docket numbers assigned in the district court. The entire record in all ten cases has been filed with the Clerk. Because of the shortage of time we have printed the record in two cases, which we deemed representative. Civ. No. 1635 (R. 1 *et seq.*) and Civ. No. 1625 (R. 49 *et seq.*). The only matters not printed to which we refer herein are the annexes to the affidavit of Mr. Weiss, referred to at pp. 5-7, *infra*, 20 copies of which have been filed with the Clerk, and the proceedings in the Court of Appeals, referred to at pp. 16-17, *infra*.

the Wage Stabilization Board (R. 47), requested the Board to investigate the dispute and promptly to report with recommendations as to fair and equitable terms of settlement. The President noted that the union and the steel producers had made no progress in resolving their differences and that it appeared unlikely that further bargaining or mediation and conciliation would suffice to avoid early and serious production losses in the vital steel industry. The President emphasized that the entire progress of national defense was threatened because any work stoppage would paralyze the entire steel industry and have an immediate and serious impact on the defense effort.

Pursuant to the referral, the Board immediately appointed a tripartite special steel panel (consisting of representatives of the public, of industry, and of labor) to hear all evidence and argument in the dispute and to make such reports as the Board might direct (R. 48). After a procedural meeting, public hearings were held in Washington, D. C., and New York beginning on January 10, and continuing until February 16. The participating parties and the masses of evidence and argument heard are indicated by the Panel Report, dated March 13, 1952, a copy of which is attached to Mr. Weiss' affidavit. This Panel Report outlined the issues in dispute, summarized the position of the parties, and was submitted to the parties for consideration and comment. Mean-

while, the Board met and prepared the "Report and Recommendations of the Wage Stabilization Board," dated March 20, 1952, and submitted it to the President on that date (R. 48). A copy of the Board Report is attached to the affidavit of Mr. Weiss. The Board's recommendations, acceptable to the union, were rejected by steel management. (R. 50.)

As noted above, no progress was made in negotiations between the parties pursuant to the union's notice of November 1, 1951, and a strike was called, as contemplated by the notice, for December 31, 1951. After the President's referral of the dispute to the Wage Stabilization Board on December 22, 1951, the union voluntarily deferred the strike which had previously been set. (R. 47.)

After respondents' refusal to accept the Board recommendations, the strike was called for 12:01 A. M., April 9, 1952 (R. 50). Ninety-six hours' notice had been given; the mills were closing and the fires were being banked. The resulting catastrophic threat to steel production was averted by the Executive Order issued by the President directing the Secretary of Commerce to take possession of the steel industry on the night of April 8, 1952. The Secretary of Commerce thereupon issued Order No. 1 taking possession of the plants, facilities and other properties of respondents and numerous other steel companies. The Order, and the accompanying telegrams sent to the companies,

designated the president or chief executive officer of each company as the Operating Manager for the United States and directed that the management's officers and employees of the plants continue their functions. (R. 16-22.)

The union immediately called off the contemplated strike and full-scale production of steel continued without interruption until April 29, 1952 after the issuance of Judge Pine's decision in the District Court.

In his Executive Order, the President set forth his findings that steel is an indispensable component of substantially all the weapons used by the armed forces, that it is indispensable in carrying out the programs of the Atomic Energy Commission, and that a continuing and uninterrupted supply of steel is indispensable for the maintenance of the civilian economy of the United States upon which our military strength depends. He concluded with the finding that (R. 6)

a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field

and that in order to avert these dangers it

is necessary that the United States take possession of and operate the plants, facilities, and other property of [the respondents].

The affidavits filed below by petitioner, which were not controverted, spell out in greater detail these findings of the President. Secretary of Defense Lovett, the cabinet officer most directly concerned with all problems of armed forces procurement and development, points out, in his affidavit, the following. (R. 22) :—That an adequate and continuing supply of steel is essential to every phase of our defense production effort at home, including the ever increasing needs of troop training; that a continued steel supply is essential to the effectiveness, safety and very existence of the armed forces fighting in Korea and stationed elsewhere overseas as part of our effort in world defense; and that no cessation of steel production can fail to add materially to the risk, from a military point of view, to which we are already subject by reason of the “stretch out” of our armament program and as a result of which we are barely able to meet our defense goals. Secretary Lovett, after disclosing, to the extent permitted by the grave considerations of security which are involved in any information of this type, the large percentage of steel production which goes into current defense requirements, emphasized the almost unbelievable extent to which our entire combat technique depends on the fullest use and availability of industrial strength and the use of vastly improved weapons, by reason of which he stated that “we are holding the line [in Korea] with ammunition.”

tion and not with the lives of our troops." From all of these factors, Secretary Lovett concluded that any curtailment in the production of steel, even for a short period of time, would imperil the safety of our fighting men and that of the nation.

Again, the gravity of any interruption in steel production to the national safety and defense efforts is sharply emphasized in the affidavit of Mr. Gordon Dean, Chairman of the Atomic Energy Commission (R. 25).¹ Mr. Dean, referring to the current major expansion of construction facilities for the production of atomic weapons, points out that success is governed by the completion of the facilities construction program on schedule; that time has already been lost and must be recovered; that the most varied and unusual types of structural steel and stainless steel must be continuously available; that inventories of materials needed for such critical projects as development of A.E.C. construction sites are abnormally low; and that, consequently, any cessation of deliveries of steel will have the critical effect of causing an inability to step up the production of atomic weapons to the rate required to meet goals established by the President.

¹ As indicated above, grave security problems are presented in furnishing any detailed information as to the effect of a cessation of steel production on defense production schedules and needs. This consideration is particularly apposite in the case of the Atomic Energy Commission.

Mr. Henry H. Fowler, Administrator of the National Production Authority, deposes (R. 27) that the products of the iron and steel industry are indispensable in the manufacture of military weapons and equipment and in the production of items required for defense-supporting programs such as those of the Atomic Energy Commission and the construction and expansion of power plants and of steel and aluminum facilities for production of railroad equipment, ships, machine tools and the like. He points out that the effect of a stoppage of steel production would vary according to inventories available to the manufacturers but in any event would quickly diminish the volume of output. Because of inventory shortages there would be an immediate slow-down in the manufacture of certain types of ammunitions and with respect to certain essential programs of the Atomic Energy Commission, which is in short supply on certain vital specialty items. The production of anti-friction bearings, mechanical power transmissions and aircraft fasteners would be quickly affected, resulting in the immediate curtailment and early shut-down of the production of aircraft, tanks and other military equipment. The same is true as to the production of air valves required for the production program of the Atomic Energy Commission. With respect to heavy power and electrical equipment, such as engines, turbines, motors, power transformers, the situation is simi-

larly critical, shipment of such equipment would be discontinued within one to three weeks after a production stoppage and Mr. Fowler estimates that "even a one week's stoppage would cause as much as one month's delay in the production of engines and turbines." This in turn would have serious effects upon the programs of the Atomic Energy Commission, the Navy's mine sweeper program and the power, aluminum and steel expansion programs. The production of electronic equipment used for military purposes also would be immediately and seriously affected, and any loss in this field would be irretrievable.

Secretary of Commerce Sawyer's affidavit discloses the critical impact which a major stoppage in steel production would have on the transportation programs of the Maritime Administration, the Civil Aeronautics Administration, and the Bureau of Public Roads (R. 38). He points out that a ten-day interruption in steel production would result in the loss of 96,000 feet of bridge and 1,500 miles of highway, that a twenty-day interruption would result in the loss of 149,000 feet of bridge and 2,280 miles of highway, and that a thirty-day interruption would result in the loss of 196,000 feet of bridge and 2,950 miles of highway; that the highway construction program, vital in defense plant and training areas, cannot continue production from inventory, and that steel for highways and bridges is ordered for specific use, delivered

for specific use, and if it is not produced and delivered the program is delayed. With respect to the effect of a steel shutdown on the shipbuilding program, Secretary Sawyer states that of the 98 ships currently in varying degrees of construction, there is sufficient steel in the yards to permit completion of only 21 of the ships, and that 39 ships are in such a stage of construction as to be directly dependent on the receipt of steel products during the present quarter. Further, Secretary Sawyer details the critical effect which a stoppage of steel production would have on the production of carrier and noncarrier aircraft. He emphasizes, with respect to production of transport type aircraft that should the production of certain components be delayed, it is anticipated that both the Convair and Douglas production lines would have to be stopped within 60 days, and that one manufacturer of aircraft has indicated that it would be preferable to close down his operations immediately rather than wait for the anticipated unavailability of a number of items to cause him to close.

Mr. Oscar L. Chapman, Secretary of the Interior, points out in considerable detail in his affidavit the drastic repercussions of any delay in deliveries of the various types of steel permitted by Defense Production Administration allotment orders to the petroleum, gas, and electric power utility fields (R. 30). Most of the steel and steel products thus allocated are for maintenance and

expansion of facilities for production and transportation, areas of activity which are obviously of the greatest importance not only for industrial use and expansion but for direct military use. The factors involved in these considerations are elaborated in Mr. Chapman's affidavit. In addition, he sets forth the crucial importance of the continued availability of steel supplies for the maintenance, repair, and operation of coal mines and coke ovens. Failure of steel supplies would result in curtailment of power production necessary for defense and military uses and would also result in a progressively severe decline in the production and availability of coal for all purposes.²

2. *Proceedings below.*—Immediately upon the issuance of Executive Order 10340, the steel companies, respondents herein, sought, by court order, to nullify the Presidential action thus taken to prevent the complete cessation of production in the steel industry.³ On the night of April 8, 1952, applications for temporary restraining orders were

² Further details of the impact upon our national security of a cessation of steel production are contained in the affidavits of Manly Fleischmann, Administrator of the Defense Production Authority (R. 26), Homer C. King, Acting Administrator of the Defense Transportation Administration (R. 36), and Jess Larson, General Services Administrator (R. 35).

³ Counsel for respondent Republic Steel Company advised the District Court that the plaintiffs (the present respondents) produce 70% of the nation's steel. In addition a complaint making similar allegations to those in the present case, has been filed by Inland Steel Company in the Northern District of Indiana, Hammond Division. Civil Action No. 1321, filed April 16, 1952. Petitioner has moved to stay that action pending disposition of the present cases.

presented *ex parte* to Judge Bastian of the District Court for the District of Columbia. The Judge declined to take action without some notice to the Government, which notice was given on the morning of April 9. At 11:00 a.m., April 9, a hearing was held before Judge Holtzoff. At the conclusion of the hearing, the applications for temporary restraining orders were denied.

Briefly summarized, the complaints filed by respondents pray for declaratory judgment and injunctive relief, narrate the expiration of the wage agreement between respondents and the union, the unproductive negotiations for a new contract, and the strike call of the steel-workers for April 9, 1952. They then allege the issuance of Executive Order No. 10340 (17 F.R. 3139) authorizing and directing Secretary Sawyer to seize the steel industry, and that Secretary Sawyer, in compliance with this order, has seized the steel industry. Respondents aver that this seizure is illegal for want of any constitutional or statutory authority in the President to issue the Executive Order.

Respondents conclude that the seizure of their plants constitutes an illegal invasion of their property rights, which exposes them to injuries for which monetary damages would afford inadequate compensation. The allegations of irreparable harm vary to some extent but center around the apprehension that the seizures might interfere with respondents' normal customer relations and destroy

their good-will, that Secretary Sawyer might make improper use of respondents' trade secrets, might place incompetent management in the plants which would wreck them physically and financially, and finally, that Secretary Sawyer might put into effect the wage agreement recommended by the Wage Stabilization Board containing wage increases and union-shop provisions (R. 1, 50).

On April 24 and 25, 1952, hearings were held in the District Court before Judge Pine on respondents' motions for preliminary injunctions seeking to restrain petitioner from taking any action under the authority of Executive Order No. 10340. Judge Pine granted the motions on April 29, 1952 (R. 77).

Immediately following the announcement of the District Court's opinion, the union called its men out and the production stoppage, which the President sought to avert, began. Formal orders were signed on April 30, 1952 (R. 87), and applications for stay were denied by Judge Pine (R. 89). On that same day the Court of Appeals for the District of Columbia, *en banc*, issued an order staying the orders of the District Court until 4:30 P.M. Friday, May 2, and if petition for certiorari is filed by that time, until this Court acts upon the petition for a writ of certiorari, and, if the petition be denied, until further order of the Court of Appeals. On May 1, 1952 that court, *en banc*, denied applications to modify its stay.

Notices of appeal were filed by petitioner on

April 30, 1952, in the Court of Appeals for the District of Columbia Circuit (R. 88) and the appeals were docketed the same day. The appeals have not been heard, submitted to, or decided by the Court of Appeals.

REASON FOR GRANTING THE WRIT

1. As a result of the decision below, a situation of the gravest national peril has been recreated. The action taken by the President on April 8 averted a threatened cessation of steel production which, as is readily apparent from the uncontroverted facts (*supra*, pp. 8-14), endangered every aspect of national security. The district court nullified the protective action taken by the President. Even if continuation of Government possession of respondents' properties resulting from the stay already ordered might, to some extent, permit stabilization of the situation by voluntary or compulsory methods, the uncertainty which necessarily inheres in the present status of these cases overshadows all other considerations and requires an immediate resolution in the public interest of the substantive issues which were sweepingly decided below.

We think it plain that the district judge erred in his disposition of the specific issues considered by him. Of at least equal significance, particularly in view of the impact of his decision on national security, is the fact that long-established standards of adjudication of constitutional issues were ig-

nored. The well settled principle is that the courts will not pass on constitutional questions where the pending matter can be disposed of on non-constitutional grounds. "If two questions are raised, one of non-constitutional and the other of constitutional nature, and a decision of the non-constitutional question would make unnecessary a decision of the constitutional question, the former will be decided. This same rule should guide the lower courts as well as this one. *Alma Motor Co. v. Timken Co.*, 329 U.S. 129, 136-137. See also *Rescue Army v. Municipal Court*, 331 U.S. 549, 568 ff. This rule has particular application in passing upon requests for preliminary injunctions. *Mayo v. Canning Co.*, 309 U.S. 310, 316. Here, on the motions for interlocutory relief, the immediately dispositive issue was not the constitutionality of the Presidential seizure but whether respondents could demonstrate that they would suffer irreparable injury and whether that irreparable injury outweighed the uncontroverted showing of injury to the public interest. Cf. *Yakus v. United States*, 321 U.S. 414, 440-441; *Harrisonville v. Dickey Clay Co.*, 289 U.S. 334. Reversing proper procedure, the district judge first held that the President's action was unconstitutional. He then utilized this central holding as the springboard from which to hold

⁴ Judge Pine stated (R. 85): "As to the necessity for weighing the respective injuries and balancing the equities, I am not sure that this conventional requirement for the issuance of a preliminary injunction is applicable to a case where the

that respondents would suffer irreparable injury, that they have no adequate legal remedy, and that any injury to the public resulting from "the contemplated strike, with all its awful results, would be less injurious to the public than the injury which would flow from a timorous judicial recognition that there is some basis for this claim to unlimited and unrestrained power,"⁵ which would be implicit in a failure to grant the injunction."

2. The constitutional issues resolved by the district court are of the utmost general importance. The basic question presented is whether the President possesses constitutional power to take action necessary to meet national emergencies. It is impossible to over-emphasize the need of resolving the problem with reference to the realities of each situation in which it arises. Here, the question cannot be resolved without a reference to the specific action, temporary in nature,⁶ which the Presi-

Court comes to a fixed conclusion, as I do, that defendant's acts are illegal. On such premise, why are the plaintiffs to be deprived of their property and required to suffer further irreparable damage until answers to the complaints are filed and the cases are at issue and are reached for hearing on the merits. Nothing that could be submitted at such trial on the facts would alter the legal conclusion I have reached."

⁵ We, of course, do not contend that the President has "unlimited and unrestrained" power. We contend only that in a situation of national emergency the President has authority under the Constitution and subject to constitutional limitations to take action necessary to meet the emergency. See *infra*, pp. 20-21.

⁶ The temporary nature of the President's action is clearly shown by his Message to the Congress of April 9, 1952, House Doc. 422, 82d Cong., 2d Sess., 98 Cong. Rec. 3962. He there stated that "the idea of Government operation of the steel

dent took in the light of the factual needs of the crisis with which he was confronted.⁷ In this frame of reference, we submit that the Constitution clearly confers the power upon the President to act as he did here.

We do not argue, in any sense, from expediency nor do we urge that the President possesses unlimited powers. On the contrary, we argue that Article II must be construed as a grant of power sufficient to permit emergency action in protection of the national interest. In no sense can this power be seen as dictatorial or without boundaries. We do not urge that the President could take action in non-federal fields or in violation of the specific commands, for example, contained in the First or Fourth Amendments. Here, the action taken by President Truman is specifically subject, among

mills is thoroughly distasteful to me and I want to see it ended as soon as possible" but, that after canvassing the available alternatives, he had concluded that "Government operation of the steel mills for a temporary period was the least undesirable of the courses of action which lay open." After suggesting various courses of action which Congress might deem desirable, he stated that he "would, of course, be glad to cooperate in developing any legislative proposals which the Congress may wish to consider."

⁷ We are prepared to show, should certiorari be granted, that the Labor Management Relations Act, 61 Stat. 136, 29 U.S.C. (Supp. IV), 141 *et seq.*, was not intended to provide an exclusive remedy in areas in which national emergencies may result from labor strife. Here, it suffices to say that the substantive mediation purpose of that statute was fully satisfied by the voluntary acts of the parties to the labor dispute, and that the statute does not provide, nor purport to provide, any mechanism which would have sufficed to meet the national crisis presented on the night of April 8.

other limitations, to that imposed by the Fifth Amendment with regards to just compensation.⁸ As stated above, the Court can easily ascertain from the uncontroverted facts presented in these cases that cessation of steel production gravely imperiled every aspect of national security. Clearly, the threatened stoppage of such production presented an emergency situation. Cf. *Hirabayashi v. United States*, 320 U.S. 81, 95. Equally clearly, the action taken by the President was effective to ward off this damaging blow to the national safety.⁹

If the validity of the President's action in seizing the mills on April 8 is to be passed upon, decision

⁸ Respondents' right to compensation under the Fifth Amendment, as well as the Government's conceded obligation to pay in this case, not only constitutes a limitation upon the executive power here exercised but clarifies the nature of respondents' position. It has been said that the Fifth Amendment necessarily implies the right to take on making just compensation. *Kohl v. United States*, 91 U.S. 367, 372-373. See also *Hurley v. Kincaid*, 285 U.S. 95, 104; *United States v. Causby*, 328 U.S. 256, 267. Whether or not the Fifth Amendment provides a complete answer to respondents' challenge to the President's action, we think it clearly gives them an adequate legal remedy. Moreover, since respondents impliedly concede that the same taking as that here involved could have been constitutionally carried out under statute, their present argument seems to be a quarrel more with the method of taking or the source of the power to take rather than with the taking itself. In this connection, it should be noted that there is no substance to the District Court's pronouncement that eminent domain is exclusively a Congressional matter. *Kohl v. United States*, *supra*, 371-2; *Portsmouth Co. v. United States*, 260 U.S. 327; *United States v. Pewee Coal Co.*, 341 U.S. 114; *United States v. Causby*, *supra*.

⁹ Throughout these cases, realistic recognition must be given to the thorough efforts on the part of the United States to interfere as little as possible with the management of respondents' plants and mills. *Supra*, pp. 7-8.

must be rooted in such considerations. And fair recognition must be given, not merely to rhetorical speculation and hypothetical abuse of power, but to the real and much more serious dangers which would arise if the executive branch of the Government be found helpless to meet such national emergencies.

The Constitution must be and on great occasions always has been read as a living document. The development of this country has never received impetus from any fixed and arid application of "immutable" principles as limitations upon the Constitution in the light of changing conditions and national needs.¹⁰ As this Court said in *Yakus v. United States*, 321 U.S. 414, 424, "The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable." Concededly, the federal government is one of limited powers. But these powers must be given realistic construction. Given such construction, we submit there can be no doubt that President Truman possessed ample constitutional power to take protective action, as he did, on April 8.¹¹

¹⁰ Prophecies of enormous danger and of "impending legal and moral chaos" upon failure rigorously to limit the powers of the Federal Government by such "immutable" principles have often been made in connection with attacks upon Congressional enactments of social legislation in the recent past. See, e.g., Mr. Justice McReynolds, dissenting, in the *Gold Clause Cases*, 294 U.S. 240, 361, 381.

¹¹ The reference in the instant and all similar Executive Orders to the authority vested in the President "by the Constitution and laws of the United States" might well be taken,

To reach the opposite conclusion, the district judge in these cases not merely employed a discredited technique of constitutional interpretation but brushed aside more than 100 years of constitutional precedent.¹² He referred to a showing that prior Presidents throughout history had always exercised executive power necessary to meet emergencies, apparently including such famous occasions as the issuance of the Emancipation Proclamation and the Louisiana Purchase, as "repetitive, unchallenged, illegal acts" of no probative value.¹³

if a narrow view were needed, to refer to the President's duty to execute all obligations flowing from mutual security statutes, international commitments such as those in Korea, treaty obligations, and other aspects of our complex international relationships, in addition to all aspects of our own defense needs. Cf. Statement by Attorney General Jackson, *The New York Times*, June 10, 1941, p. 16; *In re Debs*, 158 U.S. 564.

¹² A partial list of such precedents includes the seizure by President Lincoln during the Civil War of the railroads and telegraph lines between Washington and Annapolis (War of the Rebellion, Official Records of the Union and Confederate Armies, Series I, v. II, p. 603); the seizure by President Wilson of the properties of the Smith & Wesson Company during World War I (Baker, *Woodrow Wilson, Life & Letters, Armistice* (1939), vol. 8, pp. 401-402); and twelve seizures by President Franklin D. Roosevelt prior to the enactment of the War Labor Disputes Act of 1943, 57 Stat. 163 (Executive Orders 8773, 8868, 8928, 8944, 9108, 9141, 9220, 9225, 9254, 9340, 9341, 9351, 6 F.R. 2777, 4349, 5559, 5947, 7 F.R. 2201, 2961, 6413, 6627, 8333, 8 F.R. 5695, 6323, 8097). The first seizure of President Roosevelt occurred as much as six months prior to Pearl Harbor (Executive Order 8773; see statement of then Attorney General Jackson, *The New York Times*, June 10, 1941, p. 16). See also the opinions of Attorneys General Murphy and Biddle, 39 Op. A. G. 347-348; 40 Op. A. G. 319-320.

¹³ Neither the opinion below nor arguments of respondents can be permitted to vary the true nature of the constitutional question here presented by attempting to focus exclusively

We submit that, contrary to the view of the district judge, past practice and usage constitute strong constitutional precedent. *Inland Waterways Corp. v. Young*, 309 U.S. 517, 525; *United States v. Midwest Oil Co.*, 236 U.S. 459, 473.¹⁴

The force of this uniform constitutional usage, embodied in the actions of past Presidents when confronted by emergency situations, is given added weight by occasions on which Congress has legislated in ratification of such executive action already taken. In so doing, responsible spokesmen in both Houses of Congress have emphasized that they acted, not in derogation of, but in confirmation of the exercise of presidential power. Thus, Congress, in considering the legislation which became the War Labor Disputes Act (57 Stat. 163, 50 U.S.C. App. 1501-1511), confirmed and ratified the executive seizure of the bituminous coal mines by

on the seizure of industrial plants in instances of labor strife. As shown above, fn. 12; there are numerous past instances of such seizures and, even taking the issue on that narrow basis, there is no lack of constitutional precedent for the seizure here involved. However, the issue should not be thus narrowed. The interest represented by this petition is the public interest in the uninterrupted flow of critical steel production, not the interest of either partisan in a labor dispute.

¹⁴ Quoting a statement as to the limited view of the executive function set forth by William Howard Taft as historian, the district judge states that he will "stand on that as a correct statement of the law" (R. 82). In this connection, it is interesting to note that the executive action approved by this Court in the *Midwest Oil* case, *supra*, was taken, in the absence of statute, by Mr. Taft as President. Mr. Taft's views, as Chief Justice, are set forth in *Myers v. United States*, 272 U.S. 52, 128, 151-152, a standard expression of the broad view of executive power.

Franklin D. Roosevelt in May, 1943, and, earlier, his executive seizure of industrial plants, such as the North American Aviation plant, in which production was threatened by labor strife. 87-Cong. Rec. 5895, 5901, 5910, 5972, 5974, 5975; 89 Cong. Rec. 3807, 3885, 3886, 3887, 3896, 3989, 3992, 3993.¹⁵ Similarly, the 1862 Congress which passed legislation confirming the executive power, already exercised by President Lincoln by virtue of the Constitution, to take over railroad and telegraph facilities, indicated plainly the legislative understanding that absent such legislation the President possessed the necessary constitutional power to take such action. Cong. Globe, 37th Cong., 2d Sess., 509, 510, 512, 516, 520, 548.

The district judge appears to have reached his final position with regard to the constitutional issue on the ground that there was no specific

¹⁵ For example, Senator Connally stated (89 Cong. Rec. 3807):

There is no explicit and definite provision in any statutory enactment authorizing the taking over of plants on account of labor disturbances. The authority heretofore exercised has been the general power of the President as Commander in Chief of the Army and Navy, and such subsidiary powers as were derived from the War Powers Act. The Second War Powers Act carries a clause with regard to condemnation, under which the Government may take over temporarily any plant or property, but even that does not carry the specific authority. It was my thought that, regardless of the legal technicalities involved, it would be a wholesome thing for the Congress of the United States specifically, and in direct language, to authorize the President to do these things, and to confirm and ratify, if necessary, what the President has done and let the country know that the Congress is squarely behind the President.

✓judicial precedent at hand. Since the judge had viewed the Government as contending for an unlimited executive power, it is difficult to understand what types of judicial precedent he sought. Obviously, there are no cases which hold as a broad or abstract proposition that the President possesses unlimited powers or powers ranging beyond the Constitution, nor do we advance any such contention. If, however, heed be paid to the much more narrow nature of the Government's contention in these cases, there appears to be ample judicial precedent which sustains indirectly or by necessary inference the constitutional power of the President to take specific action to meet the needs of specific emergency situations. Cf. *United States v. Pewee Coal Co.*, 341 U.S. 114; *United States v. Russell*, 13 Wall. 623; *United States v. Pacific Railroad*, 120 U.S. 227; *Alexander v. United States*, 39 C. Cls. 383; *Dakota Coal Co. v. Fraser*, 283 Fed. 415 (D. N.D.), vacated on appeal as moot, 267 Fed. 130 (C.A. 8).¹⁶ Concededly, as we have said above, none of these cases contains an abstract declaration as to presidential power. It may be suggested that this absence of an explicit broad

¹⁶ The validity of the action challenged here has also been recognized in dicta of several lower federal courts. See *Roxford Knitting Co. v. Moore & Tierney*, 265 Fed. 177, 179 (C.A. 2); *Employers Group of Motor Freight Carriers, Inc., et al. vs National War Labor Board*, 143 F. 2d 145, 151 (C.A.D.C.), certiorari denied, 323 U.S. 735; *Ken-Rad Tube and Lamp Corp. v. Badeau*, 55 F. Supp. 193 (W.D. Ky.); *Alpirn v. Huffman*, 49 F. Supp. 337, 340 (D. Neb.).

ruling such as that required by the district judge can be explained by reference to the fundamental principle of case adjudication, namely, that decision, particularly on questions of grave importance, should never run beyond the needs of the case. *Federation of Labor v. McAdory*, 325 U.S. 450, 461. Again, the absence of explicit judicial declaration as to the scope of presidential power may be explained by the reluctance of courts in the past to reach into the delicate field of separation of powers which such declaration would necessarily entail. Cf. *Mississippi v. Johnson*, 4 Wall. 475; *State ex rel. Burnquist v. District Court*, 141 Minn. 1; *Dakota Coal Co. v. Fraser*, 283 Fed. 415 (D. N.D.), vacated on appeal as moot, 267 Fed. 130 (C.A. 8); *Holzendorf v. Hay*, 20 App. D.C. 576, writ of error dismissed, 194 U.S. 373; see also *Trial of Thomas Cooper*, *Wharton's State Trials of the United States*, pp. 659, 662.

The attitude of the district judge in this case contrasts markedly with that shown by District Judge Amidon, when called upon to issue an injunction against the Adjutant General of North Dakota in a situation comparable to that presented in these cases. Judge Amidon there said (*Dakota Coal Co. v. Fraser*, 283 Fed. at 418):

I am asked to issue a writ of injunction which will necessarily say that the acts of the Governor have been illegal and unconstitutional. If I do that, I am not simply deal-

ing with his acts; I am defining the powers of the Chief Executive of an American commonwealth to meet a crisis which threatens loss of life. I am not willing to strip the Governor of his power to protect society. I do not believe it comports with good order, with wise government, with a sane and ordered life, to thus limit the agencies of the state to protect the rights of the public as against the exaggerated assertions of private rights.

3. We submit that immediate review by this Court of the judgment below is necessary. This Court has stated that the fact "that the public interest will be promoted by prompt settlement in this court of the questions involved may constitute a sufficient reason" for the issuance of a writ of certiorari before judgment in the Court of Appeals. Rule 39.¹⁷ This case presents a situation of greater exigency than many others in which the Court has exercised its discretionary authority to issue a writ of certiorari prior to decision by the Court of Appeals. The circumstances recited above amply demonstrate the crucial importance to the national security and to the defense of the North Atlantic community and the conduct of

¹⁷ This Court has found such considerations to exist, and has granted the writ before judgment, in a number of cases. *E.g.*, *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240; *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330; *Rickert Rice Mills, Inc. v. Fontenot*, 297 U.S. 110; *Carter v. Carter Coal Co.*, 298 U.S. 238; *Hood & Sons, Inc. v. United States*, 307 U.S. 588; *Ex parte Quirin*, 317 U.S. 1; *United States v. Mine Workers*, 330 U.S. 258.

hostilities in Korea, of maintaining uninterrupted production of steel. The decision of the district court would strike down the power of the President to take action necessary to maintain such production. More broadly, it casts doubt on the powers of the President under the Constitution—powers exercised on numerous occasions by past Presidents—to take possession, in time of strife and siege, of property outside the actual scene of military operations whenever such a temporary emergency taking is necessary to protect vital national interests. The decision of the district court, if not reviewed forthwith, will stand as a rigid and dogmatic barrier not only to the efforts of the President to maintain continued production of steel, but to any kind of executive action which may become necessary to meet other and unpredictable emergencies which may hereafter crowd upon the United States. That decision can and should be set aside on any of the grounds urged above.

Even if, however, we consider only the immediate impact of the decision, we submit that the need for review and reversal by this Court is also urgent. The President's executive order had successfully averted an imminent strike. The steel plants continued in production until Judge Pine's decision was filed. Fifteen minutes thereafter a strike was called and by midnight of April 29, 1952, approximately 650,000 workers in plants pro-

ducing 95% of the country's steel had walked out and production of steel had substantially come to a stop. The evident basis of the strike was the view, embodied in Judge Pine's opinion, that the seizure is illegal and that the steel workers are no longer employees of the United States. A reversal of that decision, and a vacation of the injunctions issued by the district court would return the matter to the status in which it was prior to Judge Pine's decision, and the steel workers would again clearly be under a legal responsibility as Government employees not to strike against the Government. See *United States v. Mine Workers*, 330 U.S. 258. Meanwhile the President and the Congress would be free to take such further action as might appear appropriate to remove any further threat of cessation of steel production.

The fact that the district court's order has been temporarily stayed does not remove the urgency. A stay is necessary to preserve the situation pending determination by this Court, and for that reason we have appended to this petition a request that if certiorari is granted the judgments of the district court be further stayed until decision by this Court. But a stay can of necessity be only a stop-gap. As long as the ultimate disposition of these cases is in doubt, the respective rights and obligations of all parties affected will be uncertain and the ability of the United States to take steps necessary to protect the nation against any further

cessation or impairment of steel production will be a matter of potential controversy.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

MAY 2, 1952.

APPLICATION FOR CONTINUATION OF STAY

By order of the Court of Appeals, dated April 30, 1952, made after extensive argument on both sides, that court directed

that the orders of the District Court granting the preliminary injunctions in these cases be, and they are hereby, stayed until 4:30 o'clock P.M., Daylight Saving Time on Friday, May 2, 1952, and if petitions for writs of certiorari in these cases have then been filed in the Supreme Court, then until the Supreme Court acts upon the petitions for writs of certiorari; and, if the petitions for writs of certiorari be denied, then until the further order of this Court.

In the event that certiorari is granted, the stay granted by the Court of Appeals will cease, evidently because that court felt that once certiorari had been granted it was for this Court to provide for any stay pending final decision by this court. The considerations which, in our view, render nec-

essary the continuance of the stay granted by the Court of Appeals, should certiorari be granted by this Court, are essentially the same as those which we have urged in the foregoing petition as grounds for immediate action by this Court—namely, that while the orders are stayed the matter will remain in the status in which it was before Judge Pine's opinion was rendered, and the steel workers will continue to be under a legal responsibility as Government employees not to strike against the government.

Accordingly, the Solicitor General, on behalf of Charles Sawyer, Secretary of Commerce, prays that in the event the writ of certiorari is granted, this Court simultaneously enter an order continuing, until final disposition of the cause by this Court, the stay heretofore granted by the Court of Appeals.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

MAY 2, 1952

APPENDIX

EXECUTIVE ORDER No. 10340

DIRECTING THE SECRETARY OF COMMERCE TO TAKE POSSESSION OF AND OPERATE THE PLANTS AND FACILITIES OF CERTAIN STEEL COMPANIES

WHEREAS on December 16, 1950, I proclaimed the existence of a national emergency which requires that the military, naval, air, and civilian defenses of this country be strengthened as speedily as possible to the end that we may be able to repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made throughout the United Nations and otherwise to bring about a lasting peace; and

WHEREAS American fighting men and fighting men of other nations of the United Nations are now engaged in deadly combat with the forces of aggression in Korea, and forces of the United States are stationed elsewhere overseas for the purpose of participating in the defense of the Atlantic Community against aggression; and

WHEREAS the weapons and other materials needed by our armed forces and by those joined with us in the defense of the free world are produced to a great extent in this country, and steel is an indispensable component of substantially all of such weapons and materials; and

WHEREAS steel is likewise indispensable to the carrying out of programs of the Atomic Energy Commission of vital importance to our defense efforts; and

WHEREAS a continuing and uninterrupted supply of steel is also indispensable to the maintenance

of the economy of the United States, upon which our military strength depends; and

WHEREAS a controversy has arisen between certain companies in the United States producing and fabricating steel and the elements thereof and certain of their workers represented by the United Steel Workers of America; CIO, regarding terms and conditions of employment; and

WHEREAS the controversy has not been settled through the processes of collective bargaining or through the efforts of the Government, including those of the Wage Stabilization Board, to which the controversy was referred on December 22, 1951, pursuant to Executive Order No. 10233, and a strike has been called for 12:01 A.M., April 9, 1952; and

WHEREAS a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field; and

WHEREAS in order to assure the continued availability of steel and steel products during the existing emergency, it is necessary that the United States take possession of and operate the plants, facilities, and other property of the said companies as hereinafter provided:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and laws of the United States, and as President of the United States and Commander in Chief of the armed forces of the United States, it is hereby ordered as follows:

1. The Secretary of Commerce is hereby authorized and directed to take possession of all or such of the plants, facilities, and other property of the companies named in the list attached hereto, or any part thereof, as he may deem necessary in the interests of national defense; and to operate or to arrange for the operation thereof and to do all things necessary for, or incidental to, such operation.

2. In carrying out this order the Secretary of Commerce may act through or with the aid of such public or private instrumentalities or persons as he may designate; and all Federal agencies shall cooperate with the Secretary of Commerce to the fullest extent possible in carrying out the purposes of this order.

3. The Secretary of Commerce shall determine and prescribe terms and conditions of employment under which the plants, facilities, and other properties possession of which is taken pursuant to this order shall be operated. The Secretary of Commerce shall recognize the rights of workers to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining, adjustment of grievances, or other mutual aid or protection, provided that such activities do not interfere with the operation of such plants, facilities, and other properties.

4. Except so far as the Secretary of Commerce shall otherwise provide from time to time, the managements of the plants, facilities, and other properties possession of which is taken pursuant to this order shall continue their functions, including the collection and disbursement of funds in the

usual and ordinary course of business in the names of their respective companies and by means of any instrumentalities used by such companies.

5. Except so far as the Secretary of Commerce may otherwise direct, existing rights and obligations of such companies shall remain in full force and effect, and there may be made, in due course, payments of dividends on stock, and of principal, interest, sinking funds, and all other distributions upon bonds, debentures, and other obligations, and expenditures may be made for other ordinary corporate or business purposes.

6. Whenever in the judgment of the Secretary of Commerce further possession and operation by him of any plant, facility, or other property is no longer necessary or expedient in the interest of national defense, and the Secretary has reason to believe that effective future operation is assured, he shall return the possession and operation of such plant, facility, or other property to the company in possession and control thereof at the time possession was taken under this order.

7. The Secretary of Commerce is authorized to prescribe and issue such regulations and orders not inconsistent herewith as he may deem necessary or desirable for carrying out the purposes of this order; and he may delegate and authorize subdelegation of such of his functions under this order as he may deem desirable.

HARRY S. TRUMAN,
President of the United States.

THE WHITE HOUSE,
April 8, 1952.

LIST

American Bridge Company,
525 William Penn Place,
Pittsburgh, Pennsylvania.

American Steel & Wire Company of New Jersey,
Rockefeller Building,
Cleveland, Ohio.

Columbia Steel Company,
Russ Building,
San Francisco, California.

Consolidated Western Steel Corporation,
Los Angeles, California.

Geneva Steel Company,
Salt Lake City, Utah.

Gerrard Steel Strapping Company,
2915 W. 47th Street,
Chicago 32, Illinois.

National Tube Company,
525 William Penn Place,
Pittsburgh, Pennsylvania.

Oil Well Supply Company,
2001 North Lamar Street,
Dallas, Texas.

Tennessee Coal, Iron & Railroad Company,
Fairfield, Alabama.

United States Steel Company,
525 William Penn Place,
Pittsburgh, Pennsylvania.

United States Steel Corporation,
71 Broadway,
New York 6, New York.

United States Steel Products Company,
30 Rockefeller Plaza.
New York, New York.

United States Steel Supply Company,
208 South La Salle Street,
Chicago, Illinois.

Virginia Bridge Company,
Roanoke, Virginia.

Alan Wood Steel Company and Subsidiaries,
Conshohocken, Pennsylvania.

American Chain and Cable Company, In-
corporated,

929 Connecticut Avenue,
Bridgeport 2, Connecticut.

American Chain and Cable Company,
Monessen, Pennsylvania.

Armco Steel Corporation,
703 Curtis Street,
Middletown, Ohio.

Armco Drainage & Metal Products, Incorporated,
703 Curtis Street,
Middletown, Ohio.

Atlantic Steel Company,
P. O. Box 1714,
Atlanta, Georgia.

Babcock and Wilcox Tube Company,
Beaver Falls, Pennsylvania.

Borg-Warner Corporation,
310 S. Michigan Avenue,
Chicago 4, Illinois.

Continental Copper and Steel Industries, In-
corporated,
Braeburn, Pennsylvania.

Continental Steel Corporation,
West Markland Avenue,
Kokomo, Indiana.

- Copperweld Steel Company,
Glassport, Pennsylvania.
- Detroit Steel Corporation,
1025 South Oakwood Avenue,
Detroit 9, Michigan.
- Eastern Stainless Steel Corporation,
Baltimore 3, Maryland.
- Firth Sterling Steel and Carbide Corporation,
Demmler Road,
McKeesport, Pennsylvania.
- Follansbee Steel Corporation,
3rd and Liberty Avenue,
Pittsburgh 22, Pennsylvania.
- Granite City Steel Company,
20th Street and Madison Avenue,
Granite City, Illinois.
- Great Lakes Steel Corporation,
Tecumseh Road,
Ecorse, Detroit 18, Michigan.
- Hanna Furnace Corporation,
Ecorse, Detroit 18, Michigan.
- Harrisburg Steel Corporation,
10th and Herr Streets,
Harrisburg, Pennsylvania.
- Boiardi Steel Company,
Milton, Pennsylvania.
- Heppenstall Company,
4620 Hatfield Street,
Pittsburg, Pennsylvania.
- Inland Steel Company,
38 S. Dearborn Street,
Chicago 3, Illinois.
- Joseph T. Ryerson & Son, Incorporated,
2558 W. 16th Street,
Chicago 80, Illinois.

Interlake Iron Corporation,
1900 Union Commerce Building,
Cleveland 14, Ohio.

Pacific States Steel Corporation,
Lathan Square Building,
Oakland 12, California.

Pittsburgh Coke & Chemical Company,
1905 Grant Building,
Pittsburgh 19, Pennsylvania.

H. K. Porter Company, Incorporated,
1932 Oliver Building,
Pittsburgh 22, Pennsylvania.

Buffalo Steel Division,
H. K. Porter Company, Incorporated,
Fillmore Avenue,
Tonawanda, New York.

Joslyn Manufacturing & Supply Company,
20 N. Wacker Drive,
Chicago 6, Illinois.

Joslyn Pacific Company,
5100 District Boulevard,
Los Angeles 11, California.

Latrobe Electric Steel Company,
Latrobe, Pennsylvania.

E. J. Lavino & Company,
1528 Walnut Street,
Philadelphia, Pennsylvania.

Lukens Steel Company,
S. First Avenue,
Coatesville, Pennsylvania.

McLouth Steel Corporation,
300 S. Livernois,
Detroit 17, Michigan.

Newport Steel Corporation,
Ninth and Lowell Streets,
Newport, Kentucky.

Northwest Steel Rolling Mills, Incorporated,
4315 9th Street, N. W.,
Seattle, Washington.

Northwestern Steel & Wire Company,
Sterling, Illinois.

Reeves Steel Manufacturing Company,
137 Iron Avenue,
Dover, Ohio.

John A. Roebling's Sons Company,
640 South Broad Street,
Trenton, New Jersey.

Rotary Electric Steel Company,
Box 90,
Detroit 20, Michigan.

Sheffield Steel Corporation,
Sheffield Station,
Kansas City 3, Missouri.

Shenango-Penn Mold Company,
812 Oliver Building,
Pittsburgh 30; Pennsylvania.

Shenango Furnace Company,
812 Oliver Building,
Pittsburgh 30, Pennsylvania.

Stanley Works,
195 Lake Street,
New Britain, Connecticut.

Universal Cyclops Steel Corporation,
Station Street,
Bridgeville, Pennsylvania.

Vanadium-Alloys Steel Company,
Latrobe, Pennsylvania.

Vulcan Crucible Steel Company,

1 Main Street,

Aliquippa, Pennsylvania.

Wheeling Steel Corporation,

1134 Market Street,

Wheeling, West Virginia.

Woodward Iron Company,

Woodward, Alabama.

Allegheny Ludlum Steel Corporation,

Oliver Building,

Pittsburgh 22, Pennsylvania.

Bethlehem Steel Company,

701 East 3rd Street,

Bethlehem, Pennsylvania.

Bethlehem Pacific Coast Steel Corporation,

20th & Illinois Streets,

San Francisco, California.

Bethlehem Supply Company of California,

Los Angeles, California.

Bethlehem Supply Company,

Tulsa, Oklahoma.

Buffalo Tank Corporation,

Lackawanna, New York,

Charlotte, North Carolina,

Dunellen, New Jersey.

Dundalk Company,

Sparrows Point, Maryland.

A. M. Byers Company,

717 Liberty Avenue,

Pittsburgh 30, Pennsylvania.

Colorado Fuel & Iron Corporation,

575 Madison Avenue,

New York 22, New York.

Claymont Steel Corporation,

Claymont, Delaware.

Crucible Steel Company,

Oliver Building,

Pittsburgh 22, Pennsylvania.

Jones & Laughlin Steel Corporation,

Third Avenue and Ross Street,

Pittsburgh 30, Pennsylvania.

J. & L. Steel Barrel Company,

3711 Sepviva Street,

Philadelphia 37, Pennsylvania.

National Supply Company,

1400 Grant Building,

Pittsburgh 30, Pennsylvania.

Pittsburgh Steel Company,

1600 Grant Building,

Pittsburgh 19, Pennsylvania.

Johnson Steel & Wire Company, Incorporated,

53 Wiser Avenue,

Worcester 1, Massachusetts.

Republic Steel Corporation,

Republic Building,

Cleveland 1, Ohio.

Truscon Steel Company,

1315 Albert Street,

Youngstown, Ohio.

Rheem Manufacturing Company,

Russ Building,

San Francisco 4, California.

Sharon Steel Corporation,

S. Irvin Avenue,

Sharon, Pennsylvania.

Valley Mould & Iron Corporation,

Hubbard, Ohio.

Youngstown Sheet & Tube Company,

44 Central Square,

Youngstown 1, Ohio.

Emsco Derrick & Equipment Company,
6811 S. Alameda Street,
Los Angeles 1, California.

TELEGRAM

President, ————— Steel Company

The President of the United States by virtue of the authority vested in him by the Constitution and laws of the United States and as Commander in Chief of the armed forces of the United States has directed me, as Secretary of Commerce, by an Executive Order dated April 8, 1952, to take possession of all properties of your company which I deem necessary in the interests of national defense. I deem it necessary in such interests to take possession of, and hereby do take possession effective twelve o'clock midnight, Eastern Standard Time, April 8, 1952, of all properties of your company exclusive of railroads whose employees are subject to the Railway Labor Act and any and all coal and metal mines. You are being called upon as a loyal and patriotic citizen to serve as and are appointed Operating Manager for the United States of the properties of your company, possession of which is hereby taken, to continue operation of them for the United States. Please make acknowledgment of this call to serve by return wire in substantially the following form:

"I acknowledge receipt of appointment as Operating Manager on behalf of the United States of properties of my company."

You are authorized and directed to continue operations for the United States. All officers and

employees are directed forthwith to perform their usual functions and duties in connection with plant and office operation, and sale and distribution of products. Fly the flag of the United States and post notice of taking possession by the United States at all premises affected. In respect of all production and distribution, proceed in accordance with previously prevailing practices. Set up books in order to keep separate the period of Government operation. Advise all employees of the program. Be governed by applicable State and Federal laws and orders, regulations and directives which have been or may be issued thereunder. In respect of any properties which you feel are not, or will not be, involved in controversies referred to in the Executive order of the President, you may submit a recommendation that operation of such properties on behalf of the Government be terminated. Further instructions will follow.

Am mailing immediately copies of Executive order of the President, my Order No. 1 under that Order, and notice of taking possession.

If you are not acting as chief executive officer of the company, consider this telegram as directed to the officer who is so acting.

CHARLES SAWYER,
Secretary of Commerce.

UNITED STATES DEPARTMENT OF COMMERCE

ORDER NO. 1

April 8, 1952

By virtue of the authority vested in me by the President of the United States under an Executive Order dated April 8, 1952, "Directing the Secretary of Commerce to take possession of and operate

the plants and facilities of certain steel companies," I deem it necessary in the interests of national defense that possession be taken of the plants, facilities, and other properties of the companies named in the list specified in Appendix A attached hereto. I therefore take possession effective at twelve o'clock midnight, eastern standard time, April 8, 1952, of such plants, facilities and other properties for operation by the United States in order to assure the continued availability of steel and steel products during the existing national emergency proclaimed on December 16, 1950. The term "plants, facilities and other properties" as used herein shall include but not be limited to any and all real and personal property, franchises, rights, funds and other assets used or useful in connection with the operation of such plants, facilities and other properties and in the distribution and sale of the products thereof, but shall exclude in every instance railroads whose employees are subject to the Railway Labor Act and any and all coal and metal mines.

The president of each company named in the list specified in Appendix A attached hereto (or the chief executive officer of such company) is hereby designated Operating Manager for the United States for such company until further notice, and is authorized and directed, subject to such supervision as I may prescribe, in accordance with such regulations and orders as are promulgated by me or pursuant to authority delegated by me, to operate the plants, facilities and other properties of

such company and to do all things necessary and appropriate for the operation thereof and for the distribution and sale of the products thereof.

The managements, officers and employees, of the plants, facilities and other properties, possession of which is taken pursuant to said Executive Order, are serving the Government of the United States and shall continue their functions, including the collection and disbursements of funds in the usual and ordinary course of business, in the names of their respective companies and by means of any instrumentalities used by such companies.

Existing rights and obligations of such companies shall remain in full force and effect, and there may be made in due course payments of dividends on stock, and of principal, interest, sinking funds, and all other distributions, upon bonds, debentures and other obligations, and expenditures may be made for other ordinary corporate or business purposes.

No person shall interfere with the operation of the plants, facilities and other properties by the United States Government or the sale or distribution of the products thereof in accordance with this order.

The Operating Manager for the United States shall forthwith fly the flag of the United States upon all premises, and post in a conspicuous place upon the plants, facilities and other properties a notice of taking of possession by the United States.

Possession and operation of any plant, facility, or other property may be terminated by the Sec-

retary of Commerce at such time as he may find that such possession and operation are no longer required in the interests of national defense.

CHARLES SAWYER;
Secretary of Commerce.

APPENDIX A

Mr. F. K. McDanel, President,
AMERICAN BRIDGE COMPANY,
525 Wm. Penn Place,
Pittsburgh, Pa.

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Rockefeller Building
Cleveland 13, Ohio

Mr. Alden G. Roach, President
COLUMBIA STEEL COMPANY
Russ Building
San Francisco 6, Calif.

Mr. Joseph H. Carter, President
PITTSBURGH STEEL COMPANY
1600 Grant Building
Pittsburgh 19, Pa.

Mr. Richard S. Rheem, President,
RHEEM MANUFACTURING COMPANY,
570 Lexington Avenue,
New York 22, New York.

Mr. Henry A. Roemer, Jr., President,
SHARON STEEL CORPORATION,
Sharon, Pa.

Mr. Wm. Haig Ramage, President,
VAELEY MOULD & IRON CORPORATION,
Hubbard, Ohio.

Mr. J. Lester Mauthe, President,
YOUNGSTOWN SHEET & TUBE COMPANY,
Stambaugh Building,
Youngstown 1, Ohio.

Mr. C. L. Austin, President,
JONES & LAUGHLIN STEEL CORPORATION,
Third Avenue and Ross Street,
Pittsburgh 30, Pa.

Mr. A. E. Walker, President,
NATIONAL SUPPLY COMPANY,
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Pittsburgh 30, Pa.

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COLORADO FUEL & IRON CORPORATION,
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New York 22, New York.

Mr. W. H. Colvin, Jr., President,
CRUCIBLE STEEL COMPANY,
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New York 17, New York.

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Mr. Walther Mathesius, President,
GENEVA STEEL COMPANY,
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GERRARD STEEL STRAPPING COMPANY,
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Pittsburgh 19, Pa.

Mr. F. F. Murray, President,
OIL WELL SUPPLY COMPANY,
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TENNESSEE COAL, IRON & RAILROAD Co.,
Brown-Marx Building,
Birmingham, Alabama.

Mr. Benjamin F. Fairless, President,
UNITED STATES STEEL COMPANY,
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Mr. John Hanerwaas, President,
UNITED STATES STEEL PRODUCTS Co.,
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UNITED STATES STEEL SUPPLY Co.,
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Chicago, Illinois.

Mr. F. K. McDanel, President,
VIRGINIA BRIDGE COMPANY,
Roanoke, Virginia.

Mr. J. T. Whiting, President,
ALAN WOOD STEEL COMPANY AND SUBSIDIARIES,
Conshohocken, Pa.

Mr. Cyrus N. Johns, President,
AMERICAN CHAIN AND CABLE COMPANY,
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Bridgeport 2, Conn.

Mr. Weber W. Sebald, President,
ARMCO STEEL CORPORATION,
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Mr. R. S. Lynch, President,
ATLANTIC STEEL COMPANY,
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BABCOCK AND WILCOX TUBE COMPANY,
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Granite City, Illinois.

Mr. George R. Fink, President,
GREAT LAKES STEEL CORP.,
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UNIVERSAL CYCLOPS STEEL CORPORATION,
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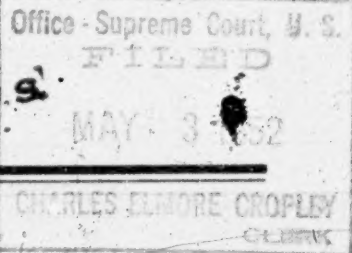
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1951

No. 745

CHARLES SAWYER, SECRETARY OF COMMERCE, *Petitioner*

v.

THE YOUNGSTOWN SHEET AND TUBE COMPANY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of
Appeals for the District of Columbia Circuit

and

Application for Stay

MEMORANDUM ON BEHALF OF RESPONDENTS

IN THE
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and

Application for Stay

MEMORANDUM ON BEHALF OF RESPONDENTS

The respondents have no objection to the granting of the present petition.

We have here a situation which, as Mr. Sawyer asserts, is "of the gravest national peril" requiring "an immediate resolution in the public interest of the substantive

issues which were sweepingly decided below." (Petition, page 17.)

Mr. Sawyer's petition for a writ and application for a stay argues these propositions:

1. There should be immediate review of the District Court's injunction because of the tremendous public importance of the questions involved and the pressing need that those questions be answered authoritatively.

2. A stay should be issued which will lift the force of the injunction and permit Mr. Sawyer to direct the operation of the steel industry and to prescribe its labor relations.

3. The District Court's order granting an injunction should be reversed on the ground that (a) it was based upon a decision that the Executive Order, under which Mr. Sawyer purports to act, is invalid and (b) that question should not be reached until a final hearing.

In this argument counsel for Mr. Sawyer moves in two directions at once. On the one hand he asserts that there is a paramount public interest in freeing Mr. Sawyer of any legal restraint and in permitting him to act as he sees fit for the months which could elapse before a hearing and final decision on a permanent injunction. On the other hand it is recognized (Petition, page 30):

"But a stay can of necessity be only a stop-gap. As long as the ultimate disposition of these cases is in doubt, the respective rights and obligations of all parties affected will be uncertain and the ability of the United States to take steps necessary to protect the nation against any further cessation or impairment of steel production will be a matter of potential controversy."

This inconsistency points up the imperative need for final disposition by this Court now, and for the preservation of the *status quo* pending that disposition so that the

rights of these respondents will not be irretrievably impaired in the meantime. The interests of the respondents, whose rights have been upheld by the District Court, should not be sacrificed while the case is being decided.

As we have said, the respondents here do not oppose the writ prayed by Mr. Sawyer.* But the respondents do object most vigorously to the course of action proposed on behalf of Mr. Sawyer. From every point of view, it is submitted, what is most required by the public interest and by the spirit of our tripartite Constitutional system is that this Court, the ultimate and final judicial authority, should settle the rights and obligations of the parties to this great controversy at the earliest time consistent with the deliberation necessary for wise determination of an issue fundamental to the structure of our government. Otherwise the most serious injury will be suffered not only by the respondents but by all parties concerned in this controversy.

The first and longest step in the contrary course of procedure proposed on behalf of Mr. Sawyer is the issuance of an unconditioned stay. That is the step which would free Mr. Sawyer from all legal restraint for months to come. If that stay is issued, as prayed, Mr. Sawyer will then seek to appropriate the respondents' private funds to grant the Union whatever wage and other concessions he sees fit and to impose on the respondents a new pattern of employment conditions which cannot be undone. This record shows clearly that he threatens to take precisely that course, and that that is the reason that he prays for the stay.

If that long step is taken by this Court, then even if this Court proceeds promptly to a decision of this legal and

* In the event the writ shall be granted, respondent E. J. Lavino & Company reserves its rights to develop, in connection with any stay or in argument on the merits, the further grounds for relief which are referred to in the footnote on page 5 of the petition in No. 744.

Constitutional controversy, it will be unable effectively to dispose of this case as law and justice may require. Inevitably the respondents would suffer grievous and irreparable injury.

Mr. Sawyer's petition wholly abandons the groundless claim of his counsel in the District Court that if his acts are invalid the steel companies have a remedy under the Federal Tort Claims Act.

And the concession of Mr. Sawyer's counsel in the District Court that the steel companies would have no right to sue for damages in the Court of Claims for the damaging consequences of his acts (if they are not the acts of the United States because invalid) is not modified in Mr. Sawyer's petition. On the contrary Mr. Sawyer's counsel carefully—indeed adroitly—refrains from questioning the authority of *Hooe v. United States*, 218 U. S. 322, 335-336 (1910); *United States v. North American Transportation & Trading Company*, 253 U. S. 330 (1920); and *Larson v. Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 695 (1949). Those three cases stand squarely for the principle that no suit will lie in the Court of Claims for compensation for an *illegal taking*.*

Finally there is not a word in the Solicitor General's argument in the petition that weakens by one jot the force of this Court's opinion in *American Federation of Labor v. Watson*, 327 U. S. 582, 593-595 (1946), to the effect that impairment of the collective bargaining position of a party to a labor dispute is an utterly irreparable and immeas-

* The petition of Mr. Sawyer does not even refer to those controlling cases which are referred to at pages 10 and 11 of the petition in No. 744. Instead, in footnote 8 on page 21 of Mr. Sawyer's petition, it is simply asserted "Whether or not the Fifth Amendment provides a complete answer to respondents' challenge to the President's action, we think it clearly gives them an adequate legal remedy." Nothing is cited to support that assertion, and no effort is made to deal with the bar to suit in the Court of Claims arising from the fact that an unlawful taking of property by Mr. Sawyer is *not* a taking by the United States.

urable injury; nor is there—nor could there be²—any denial that Mr. Sawyer's threatened change in employment conditions, if consummated, would destroy the collective bargaining position of the steel companies in relation to the Union. His acts would raise for all time the level on which the Union would be able to stand in its present and future bargaining with the companies.*

We submit that there is one, and only one, course of action which can be taken if a stay is granted—and that is the attachment to the stay of a condition which would prevent Mr. Sawyer from changing the *status quo* with respect to terms and conditions of employment. This would mean that those conditions could be changed by collective bargaining between the companies and the Union under the Labor Management Relations Act while this Court is considering the case—but could not be changed by fiat of Mr. Sawyer.

No possible injustice would be done by such a condition. The Union, which presumably will not strike while Mr. Sawyer's seizure continues, loses no right. It is true that in the collective bargaining that will continue pending this

*The Union has made it quite clear that it will treat Sawyer-imposed terms and conditions as a new floor from which to bargain in the future. In the brief *amicus* filed in Nos. 744 and 745 by the United Steelworkers of America, at p. 7, the Union argues that the bargaining position of the respondents will not be impaired because "when the mills are restored to their possession they will have the right and it will again be their duty to bargain with the Union concerning the then current wages and working conditions." (Emphasis added.) It is obvious that the Union's view of the matter would be that, having pocketed the gains from the Sawyer-imposed terms, they will trade from that point in the future. The abiding effect of labor conditions prevailing during government seizure was recognized by the War Labor Board under the War Labor Disputes Act. That Board customarily consulted with the owners of the plant because of "the likelihood that the period of governmental operation may be short and the effect of the changes may last beyond this period." Opinion of the General Counsel of the War Labor Board, 15 L.R.R.Man. 2578 (1944).

Court's decision the strike threat will not be available. But this Court's decision will come soon. When it comes, if the seizure is invalidated, the Union will have its strike weapon in support of such demands for retroactive wage increases as it may wish to assert. If the seizure is validated, it will be validated *ab initio* and Mr. Sawyer's power to grant the Union's demands with respect to the period during which the case is pending will be all that it could possibly be if an unconditioned stay were issued now.

The only possible argument against attaching the condition—demanded by every consideration of equity toward the steel companies for whose funds Mr. Sawyer is even now reaching to placate the Union—is that the Union will strike against a stay so conditioned. In his memorandum in response to the petition in No. 744 counsel for Mr. Sawyer lays it down bluntly that "Any change in the nature of the stay now in effect would probably result in a new crisis, with danger of still another interruption." (Memorandum on behalf of Respondent in No. 744, page 2). A suggestion that this Court should not do equity because a powerful Union might strike against this Court's action has implications hardly less grave than the basic Constitutional issue in Mr. Sawyer's seizure.

But we need not be concerned about Mr. Sawyer's counsel's suggestion of a threatened strike. The Union itself has filed a brief *amicus* and does not even intimate that it would call a strike if a stay were conditioned as respondents request. Its *only* objection is its assertion that the condition would prevent it from bargaining as to terms and conditions of employment since it would "have no employer with which it can bargain." (Brief *amicus*, page 3.)

This extraordinary statement is altogether without foundation. The Executive Order does not affect the right of the employees to bargain with the steel companies.* In

* We submit that sections 3 and 4 of the Order plainly recognize such right.

fact, immediately after the seizure collective bargaining between the companies and the Union was resumed. The companies are ready and willing to bargain with the Union now. Mr. Sawyer has never suggested that there is any bar to or qualification on the Union's right to bargain with the companies. In the application for a stay filed on Mr. Sawyer's behalf in the Court of Appeals it was stated specifically that one of the consequences of seizure was to accomplish resumption of collective bargaining between the Union and the respondents.* And if there were any shadow of doubt as to the Union's right under the Executive Order to bargain with the companies and, through an agreement thus reached, to determine the terms and conditions of employment, that shadow of a doubt could be laid at rest by a simple change in the terms of that Order or by an express provision in the stay itself.** It is absurd to suggest that the Order or Mr. Sawyer intends to prevent such bargaining. If anything has characterized the arguments in support of the legality of the seizure it is the proposition that the *only* thing that Mr. Sawyer is interested in is the continued operation of the steel plants; his whole case here presupposes that he is *not* interested

* In paragraph 3 in "Application for Stay Pending Appeal From Order Granting Preliminary Injunction" filed on behalf of Mr. Sawyer in the Court of Appeals in each one of the cases it was stated: "The Government possession under Executive Order No. 10340 had the effect of keeping the steel plants and facilities in operation *while collective bargaining between the plaintiff and the United Steel Workers of America, CIO, looking toward possible agreement and return of the plants and facilities continued* . . ." (Emphasis added.) (R. 443)

** Executive Order No. 10340 does not state specifically as does sec. 6 of Executive Order No. 10155 under which certain railroads have been seized, that the employees have the right to bargain collectively *with the companies*. If that omission is deemed of any significance—and it obviously is not—the stay sought on behalf of Mr. Sawyer could be conditioned on a requirement that Mr. Sawyer recognize the Union's right of collective bargaining with the companies.

in determining the terms and conditions of employment except as that may be necessary to secure such operation; obviously if the Union and the companies reached an agreement between themselves over the terms of employment Mr. Sawyer would be the first to applaud.

CONCLUSION

It must be concluded, therefore, that if a stay is issued a condition therein, as prayed by the respondents, will preserve the bargaining position of the parties, will prevent irreparable injury, and will adversely affect no one. It will maintain the case in a posture permitting equitable disposition by this Court as the law requires.

Respectfully submitted,

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JOHN C. GALL,
T. F. PATTON,
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CHARLES ELMORE

IN THE
Supreme Court of the United States,

October Term, 1951

No. 745

CHARLES SAWYER, Secretary of Commerce,

v.

THE YOUNGSTOWN SHEET AND TUBE COMPANY, ET. AL.

**ADDITIONAL BRIEF FOR RESPONDENT
E. J. LAVINO AND COMPANY.**

RANDOLPH W. CHILDS,
EDGAR S. MCKAIG,
JAMES CRAIG PEACOCK,
Counsel for Respondent Lavino.

INDEX.

	Page
Brief	1
Opinion Below	1
Statement	1
Appendix: Memorandum in Support of Additional Ground for Preliminary Injunction in the Lavino Case	4
The Facts	4
Argument	7
I. Irrespective of its validity or invalidity with respect to the other plaintiffs in the District Court, Executive Order 10340 is not by its terms applicable to Lavino	7
II. The termination of the preliminary injunc- tion would cause irreparable injury to Lavino	10
III. In the event that this Court should reverse the order of the District Court in the suits of the other plaintiffs, the Lavino case should be remanded and the present restric- tions upon action by respondent Sawyer should be continued	11

IN THE
Supreme Court of the United States

October Term, 1951

No. 745

CHARLES SAWYER, Secretary of Commerce,

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THE YOUNGSTOWN SHEET AND TUBE COMPANY, ET. AL.

**ADDITIONAL BRIEF FOR RESPONDENT
E. J. LAVINO AND COMPANY.**

OPINION BELOW

The opinion of the District Court is reported at 80
W. L. R. 411.

STATEMENT

Respondent Lavino joins unreservedly in the briefs and arguments presented or to be presented by all the companies which are parties in this Court's Docket Nos. 744 and 745. If the position there advanced as to the invalidity of Executive Order 10340 prevails, then, by the same token, the preliminary injunction granted Lavino will in due course be affirmed.

But Lavino does not make steel. Nor was it a party to the long drawn out and thrice mentioned controversy on which the directives of Executive Order 10340 were expressly premised.

In Lavino's motion for a preliminary injunction the additional ground was assigned that, wholly irrespective of the validity or invalidity of the Executive Order generally, it is not by its terms applicable to Lavino, and, if construed as so applicable, it is invalid, at least to that extent. (R. 190.) This point was expressly noted by the District Court in its opinion (R. 66, 67), but that Court had no occasion to pass on it in view of its disposition of all seven cases on the common ground of the over-all invalidity of the Executive Order.

This brief is confined to that very limited aspect of Docket No. 745 which is the case in which petitioner Sawyer seeks reversal of all the preliminary injunctions. He has, however, failed to print for the convenience of this Court any of the record in the Lavino case, and because of the shortness of time this petitioner has had to assume that burden and expense.

We realize that the initial burden of passing on the additional ground in the Lavino case should not be imposed on this Court (although the power of the President to seize a plant which is outside the industry concerned and where there has been no labor controversy presents a further constitutional question comparable in importance with the one that has been accepted for review). But neither should petitioner Sawyer, even if he should prevail on the question that is here, be entitled to absolute and unrestrained freedom of action to the irreparable injury of Lavino until the latter has at least been accorded a hearing on what is to it an equally important branch of its case. Especially so when he has even failed to print the relevant portions of the record. Lavino is not within the scope of the Executive Order. And even if Lavino could be construed as within its terms the Order is to that extent invalid.

For the information of this Court a memorandum summarizing our position on those points is attached hereto as an Appendix at page 4, *infra*.

If the over-all question of common application to all seven cases had not existed, the District Court would have had to pass on this particular issue as to Lavino not being within the scope of the President's Order. If petitioner Sawyer should now prevail, it will be as if that great issue had never existed. But unless petitioner Sawyer is prevented from making any changes in respondent Lavino's terms and conditions of employment pending decision on the question of the Order's inapplicability to it, Lavino will be denied the protective maintenance of the status quo which might reasonably be assumed would have been granted to it at the time of its application to the District Court, had its own particular case not been overshadowed by the over-all question of common application to all the respondents.

It is submitted therefore that, if petitioner Sawyer should prevail on the over-all question, the Lavino case should be remanded to the appropriate lower court for decision of its own preliminary injunction question on its merits, but that pending such decision, the same restriction against interim action by petitioner Sawyer which was embodied in this Court's stay orders of May 3 should be continued in effect as to respondent Lavino.

Respectfully,

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Counsel for Respondent Lavino.

APPENDIX

MEMORANDUM IN SUPPORT OF ADDITIONAL GROUND FOR PRELIMINARY INJUNCTION IN THE LAVINO CASE.

This memorandum is substantially the same as the brief and argument which would be presented to this Court if it were passing on the additional issue in this case, and which will be presented to the lower Court if that question should be remanded to it. It is made available at this time and in this way for the information of this Court in connection with Lavino's contingent request for temporary continuance of the present restriction on petitioner Sawyer's authority to alter terms and conditions of employment.

THE FACTS

Lavino is not a producer of steel

E. J. Lavino and Company ("Lavino"), a Delaware corporation, is engaged in the sale of manganese and chrome ores, ferro manganese and refractories. It also manufactures basic refractories and ferro manganese. It does not manufacture or fabricate steel or steel products (Affidavits of Andrew Leith and George B. Gold, R. 192, 200).

Three of Lavino's plants are involved in the seizure. One is a basic refractories plant at Plymouth Meeting, Pennsylvania. It produces refractories, which are used for lining furnaces, and it has many customers outside the steel industry. For example, basic refractories are sold not only to steel producers but to producers of power, cement, paper, nickel and copper. (Leith, Gold, R. 192, 201). It has two other plants, one at Sheridan, Pennsylvania, and one at Lynchburg, Virginia, which produce ferro manganese. The products of all of Lavino's plants are standard products and are not made to meet the specifications of particular customers. (Leith, Gold, R. 192, 201).

The principal competitors of Lavino, outside of two steel producers in the case of ferro manganese, are not in the steel industry, and their hourly workers are not represented by the Steelworkers. (Gold, R. 201).

The job titles or classifications of Lavino's hourly workers are different from the job classifications of the steel producers. Attached to Mr. Gold's affidavit is a tabulation with respect to each of Lavino's plants at Plymouth Meeting, Pennsylvania, Sheridan, Pennsylvania, and Lynchburg, Virginia. The tabulation shows: (a) job titles, (b) the wage rate for each job, and (c) the number of employees in each job. The content of the jobs shown in the schedule attached to Mr. Gold's affidavit is not the same as the content of jobs in the steel industry, except as to a limited number of jobs in the blast furnace operations of Lavino conducted at its plants at Sheridan, Pennsylvania, and Lynchburg, Virginia, and as to the latter jobs there are variations in the job content. (Gold, R. 203-206).

The terms of any new collective bargaining agreements between Lavino and the Steelworkers must take into consideration conditions in Lavino's industry, including wage rates and other terms of employment prevailing in the plants of its competitors. For example, the wage rates and other terms of employment in its basic refractories plant at Plymouth Meeting cannot be founded on the terms of any collective agreement bargaining which may be reached in the basic steel industry. (Gold, R. 201:202).

Lavino is not a party to the labor controversy between the steel producers and the Steelworkers.

Historically Lavino has never been called upon to participate in collective bargaining with the Steelworkers in conjunction with the steel producers. Its bargaining has been conducted on a single plant basis. Its contract with the Steelworkers expires not December 31st, as in the case of steel producers, but January 31st. (Affidavit of Andrew Leith, R. 193-194).

It was not until March 21, 1952, (the day following the filing of the report of the Wage Stabilization Board, with its accompanying recommendations) that Philip Murray sent Lavino a telegram stating that he was ready to engage in collective bargaining negotiations with Lavino, and that the chairman of his bargaining committee would get in touch with Lavino. He never did so. (Leith, R. 194).

As of April 4, 1952, the local union in Lavino's Plymouth Meeting plant posted a notice as follows:

"Contract negotiations between E. J. Lavino and Company and Local Union #3216 will commence Tuesday or Wednesday of next week. In the event a strike takes place in the Basic Steel Industry on April 8th, employees of E. J. Lavino and Company will not be involved." (Leith, R. 195.)

On April 7, 1952, however, Lavino received from Philip Murray three identical letters, which he had written on April 4th, stating that a strike would be called at Lavino's three plants at 12 o'clock April 8th. Lavino has never refused to participate in collective bargaining negotiations with the Steelworkers. (Leith, R. 195.)

As stated in the verified complaint and the affidavit of Andrew Leith, Lavino was not a party to the controversy which was referred by the President of the United States to the Wage Stabilization Board on December 22, 1951. (R. 193.)¹ No collective bargaining negotiations have taken

¹ It was not until April 23, 1952, on the eve of the oral argument before Judge David A. Pine on Lavino's application for a preliminary injunction, that Lavino's counsel was advised by an attorney in the Department of Justice that on December 29, 1951, the President wrote a letter to the Chairman of the Wage Stabilization Board giving a list of employers stated to have a labor controversy pending between them and the Steelworkers. No copy of this letter was ever sent or communicated to Lavino by the President, the Wage Stabilization Board, the Steelworkers, or anyone else. Lavino had no knowledge of the existence of this letter, received no notice of proceedings before the Wage Stabilization Board, and did not participate, or have an opportunity to participate, in any of such proceedings.

place between Lavino and any representatives of the Steelworkers regarding terms and conditions of employment under a new collective bargaining agreement. (Leith, R. 195.)

ARGUMENT

I. Irrespective of its validity or invalidity with respect to the other plaintiffs in the District Court, Executive Order 10340 is not by its terms applicable to Lavino, and if construed as so applicable, it is invalid at least to that extent.

Executive Order 10340 contains the two recitals which follow.

"Whereas a controversy has arisen between certain companies in the United States producing and fabricating steel and the elements thereof, and certain of their workers represented by the United Steelworkers of America, CIO, regarding terms and conditions of employment; and

"Whereas the controversy has not been settled through the process of collective bargaining or through the efforts of the Government, including those of the Wage Stabilization Board, to which the controversy was referred on December 22, 1951, pursuant to Executive Order 10233, and as a strike has been called * * *"
(R. 5, 6.)²,

² That Lavino was not a party to the controversy on which the President's Order was based, and that its limited area of relations with the Steelworkers has not yet reached the point which could be characterized even as a difference of opinion let alone a controversy, is dramatically confirmed by the happenings of the past few days. On May 1, 1952, Lavino received from H. Charles Ford, representing the Steelworkers, a letter, dated April 30, 1952, advising Lavino that the Steelworkers desired "to commence contract negotiations with" Lavino "on the basis of the recommendations of the Wage Stabilization Board in the basic steel dispute." The letter requested a conference at an early date, "with the purpose of concluding a single agreement covering all the properties where the employees are represented by the United Steelworkers of America." Lavino replied under date of May 2, 1952, stating that it had already advised the Steelworkers of Lavino's willingness to negotiate a new contract on a separate basis for each

As appears in our statement of facts Lavino does not produce or fabricate steel. It is not a part of the steel industry. At the utmost it might be said to be a supplier to steel companies, and there are many suppliers, some of whom have contracts with the Steelworkers, whose plants were not seized. These suppliers are proprietors of plants producing ball bearings, lime, silica brick products, etc.

As stated above, no controversy had arisen between Lavino and the Steelworkers on December 22, 1951, and indeed it was not until March 21, 1952, that the Steelworkers even suggested starting collective bargaining negotiations with respect to new contracts to replace the contracts which expired on January 31, 1952.

While as pointed out in footnote (1) above, it was disclosed to Lavino on the eve of the argument before Judge David A. Pine on Lavino's application for a preliminary injunction that the President included Lavino's name in a letter, dated December 29, 1951, to the Chairman of the Wage Stabilization Board as a company which had a labor controversy with the Steelworkers, no such controversy existed, and Lavino had no knowledge of the President's letter. It could therefore have no legal effect upon Lavino.

(a) The Executive Order should not be construed to authorize the defendant to seize Lavino's plants.

As Executive Order 10340 was bottomed on the existence of a controversy between certain steel producers and Steelworkers, and as no such controversy existed in the case of Lavino, Executive Order 10340 cannot be construed as applicable to Lavino, and therefore the defendant, who was given authority to take possession of such plants as he deemed necessary, was not justified in taking possession of Lavino's plants.

plant. Lavino renewed its offer to meet with the Steelworkers' representative on an individual plant basis and stated the name of the attorney who would represent Lavino in negotiations for a new contract.

To construe Executive Order 10340 as authorizing the seizure of Lavino's plants is to assume the existence of facts which simply do not exist. It is to assume, contrary to fact, that Lavino is a steel producer and that Lavino was a party to a controversy with the Steelworkers which was referred to and considered by the Wage Stabilization Board.

But Lavino's position is not based merely on technical grounds.

In the event that this Court should sustain defendant Sawyer's seizure of the plants of the steel producers, his declared policy is to increase the wages and other terms of employment of the hourly workers. This action would put Lavino at an unfair disadvantage with respect to its competitors in the basic refractories field and in the ferro manganese field, which do not have collective bargaining agreements with the Steelworkers.

Moreover, in the event that the Government affords price relief to the steel producers, to offset wage increases, such relief will not benefit Lavino. Lavino is not selling steel or steel products, and obviously any increase in price ceilings of steel or steel products would not benefit Lavino. Moreover, some of the most important ingredients which go into Lavino's products, for example manganese, are imported from foreign countries, and are therefore not subject to price control. Lavino's need for price relief requires entirely separate treatment from any relief granted to the steel producers.

(b) Even if Executive Order 10340 can be construed as requiring the seizure of Lavino's plants, Executive Order 10340 would not be valid as applied to Lavino.

Whatever the powers of the President of the United States may be to seize a plant in a given industry where employer and employees have exhausted the possibilities of arriving at a collective bargaining agreement, and where they cannot reach an agreement even after their disputes

have been submitted to a national board by Presidential order,—the President does not have the power to seize a plant of an employer, not a part of such industry, where no such negotiations have taken place and where no national board has passed upon the issues between the employer and his employees.

Our review of the cases involved in plant seizure by the President, even in time of war and under statutory authority from Congress, reveals no instance in which the President of the United States has purported to seize a plant where no preliminary negotiations between employer and employees, and no national board's recommendations on a controversy, have preceded such seizure. Even the Government's counsel may hesitate to deny that the President's power of seizure must be predicated upon the existence of facts supporting the seizure, and that the President cannot by fiat create facts which are non-existent.

Certainly the mere fact that Lavino's hourly workers are represented by the Steelworkers cannot validate a seizure which is otherwise invalid. As pointed out at page 8 of this memorandum, there are numerous suppliers to the steel producers, some of whose employees are represented by the Steelworkers, whose plants have not been seized. Lavino, as well as these other suppliers, has the right of bargaining negotiations with the Steelworkers, separate and apart from the nationwide negotiations between the steel producers and the Steelworkers.

II. The termination of the preliminary injunction would cause irreparable injury to Lavino.

It is unnecessary to repeat the statement of facts contained in this memorandum and in Lavino's supporting affidavits. In the event that the defendant should put into effect any changes in wage rates, Lavino would suffer irreparable harm in that—

(a) *These wage rates would be unsuited to Lavino's industry.*

The facts as to the difference of operations in Lavino's industry as compared with those of the steel producing industry, the difference in job classifications, and the fact that Lavino has not participated in nationwide bargaining negotiations with the Steelworkers in conjunction with the steel producers, have been referred to above at pages 4-7.

(b) *These wage rates would be most unfair to Lavino.*

As pointed out above, the principal competitors of Lavino, outside of two steel producers in the case of ferro manganese, are not in the steel industry and their hourly workers are not represented by the Steelworkers. In consequence, a change in wage rates would put Lavino at a great disadvantage with respect to its competitors.

(c) *No price relief granted to the steel producers, to offset wage increases, would give relief to Lavino.*

This point is discussed in this memorandum at page 9 above.

III. In the event that this court should reverse the order of the District Court in the Suits of the other plaintiffs, below.

(a) Lavino's suit should be remanded to the District Court with direction to hear Lavino's case on the merits.

(b) The stay of proceedings should continue and the defendant should be restrained from making any changes in terms and conditions of employment of Lavino's employees, pending the entry of a final decree in Lavino's suit.

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Questions presented.....	2
Constitutional provisions and Executive Order involved.....	2
Statement.....	4
1. The wage dispute.....	5
2. The seizure.....	8
3. Court proceedings.....	15
4. Events subsequent to seizure.....	18
A. Congressional activity.....	18
B. Course of negotiations.....	22
Argument:	
Introduction.....	25
Summary of position.....	25
The nature of the emergency.....	29
The military and foreign affairs crisis.....	31
Steel and defense.....	39
I. The district court erred in granting a preliminary injunction.....	49
Introductory.....	49
A. Plaintiffs have an adequate remedy at law.....	54
B. Plaintiffs have made no showing of injury sufficient to counterbalance the injury to the public interest which would flow from the granting of an injunction.....	75
1. Plaintiffs have made no showing of irreparable injury.....	75
2. Any injury to plaintiffs is more than counterbalanced by the injury to the public from the granting of an injunction.....	85
II. The taking of plaintiffs' properties was a valid exercise of authority conferred on the President by the Constitution and laws of the United States.....	91
A. General nature of the area of constitutional power involved.....	91
B. The President, without specific statutory authority, may seize property to avert crises during time of war or national emergency, subject to the payment of just compensation.....	102
1. Executive construction.....	103
2. Legislative construction.....	112
3. Judicial precedent.....	121

Argument—Continued

Page

C. The extensive system of laws providing for national security, which the President is obligated to enforce, justified the taking-----	144
III. The Labor Management Relations Act did not preclude the President's emergency action in this case-----	150
A. The President was not required to use the procedures of the Labor Management Relations Act--	153
B. The Labor Management Relations Act did not preclude executive seizure-----	160
Conclusion-----	172

CITATIONS

Cases:

<i>Aitken v. Village of Wells River</i> , 70 Vt. 308-----	125
<i>Alexander v. United States</i> , 39 C. Cls. 383-----	137
<i>Alma Motor Co. v. Timken Co.</i> , 329 U. S. 129-----	51
<i>Alpin v. Huffman</i> , 49 F. Supp. 337-----	103, 140
<i>American Print Works v. Lawrence</i> , 23 N. J. L. 590-----	125
<i>Ashwander v. Tennessee Valley Authority</i> , 297 U. S. 288-----	91
<i>Blackmar v. Guerre</i> , 342 U. S. 512-----	53
<i>Boarditch v. Boston</i> , 101 U. S. 16-----	125
<i>Barton v. United States</i> , 196 U. S. 283-----	51
<i>Campbell v. United States</i> , 266 U. S. 368-----	55
<i>Cities Service Co. v. McGrath</i> , 342 U. S. 330 (affirming 189 F. 2d 744)-----	68
<i>Cleveland v. United States</i> , 329 U. S. 14-----	172
<i>Coffman v. Breeze Corporations</i> , 323 U. S. 316-----	54
<i>Communist Party of United States v. McGrath</i> , 96 F. Supp. 47-----	86
<i>Cotton Land Co. v. United States</i> , 100 C. Cls. 810-----	66
<i>U. S. Air Lines v. Waterman Corp.</i> , 333 U. S. 103-----	94
<i>Curtiss Candy Co. v. Clark</i> , 165 F. 2d 791, certiorari denied, 334 U. S. 820-----	83
<i>Dakota Coal Co. v. Fraser</i> , 283 Fed. 415, vacated on appeal as moot, 267 Fed. 130-----	52, 111, 141
<i>Debs, In re</i> , 158 U. S. 564-----	98, 100, 101, 111, 148
<i>Dorris v. Grace</i> , 24 Ark. 326-----	106
<i>DuPont de Nemours & Co. v. Davis</i> , 264 U. S. 456-----	102
<i>Eighth Regional War Labor Board v. Humble Oil Co.</i> , 145 F. 2d 462, certiorari denied, 325 U. S. 883-----	86
<i>Emancipation Cases, The</i> , 31 Tex. 504-----	106
<i>Employers Group, etc. v. National War Labor Board</i> , 143 F. 2d 145, certiorari denied, 323 U. S. 735-----	140
<i>Fay v. Miller</i> , 183 F. 2d 986-----	69
<i>Federation of Labor v. McAdory</i> , 325 U. S. 450-----	91
<i>Forest of Dean Iron Ore Co. v. United States</i> , 106 C. Cls. 250-----	66
<i>Foster v. United States</i> , 98 F. Supp. 349, certiorari denied, 342 U. S. 919-----	66

Cases—Continued

Page

<i>Gillespie-Rogers-Pyatt Co. v. Bowles</i> , 144 F. 2d 361.....	83
<i>Grant v. United States</i> , 1 C. Cls. 41, dissenting opinion, 2 C. Cls. 551.....	133, 134
<i>Hamilton v. Kentucky Distilleries Co.</i> , 751 U. S. 146.....	139
<i>Harrison v. Wisdom</i> , 54 Tenn. (7 Heisl.) 99.....	131
<i>Harrisonville v. Dickey Clay Co.</i> , 289 U. S. 324.....	86, 89
<i>Hecht Co. v. Bowles</i> , 321 U. S. 321.....	167
<i>Hefebower v. United States</i> , 21 C. Cls. 228.....	134
<i>Helvering v. Clifford</i> , 309 U. S. 331.....	172
<i>Hirabayashi v. United States</i> , 320 U. S. 81.....	49, 94, 102, 152
<i>Hirota v. MacArthur</i> , 338 U. S. 197.....	97
<i>Holzendorf v. Hay</i> , 20 App. D. C. 576, writ of error dismissed, 194 U. S. 373.....	52
<i>Home Building & Loan Association v. Blaisdell</i> , 290 U. S. 398.....	29, 92, 96
<i>Hooe v. United States</i> , 218 U. S. 322.....	64, 67, 69
<i>Hurley v. Kincaid</i> , 285 U. S. 95.....	26, 27, 55, 61, 64, 72, 76, 89, 90
<i>Idaho Maryland Mines Corp. v. United States</i> , C. Cls. No. 50182, decided May 6, 1952.....	66
<i>Inland Waterways v. Young</i> , 309 U. S. 517.....	121
<i>International Harvester Co. v. United States</i> , 72 C. Cls. 707.....	66
<i>International Paper Co. v. United States</i> , 282 U. S. 399.....	26, 55, 61, 71
<i>Jacobs v. United States</i> , 250 U. S. 13.....	60, 65, 72
<i>Ken-Rad Tube & Lamp Corp. v. Radeau</i> , 55 F. Supp. 193.....	103, 140
<i>Kohl v. United States</i> , 91 U. S. 367.....	129
<i>Larson v. Domestic and Foreign Corporation</i> , 377 U. S. 682.....	53, 64, 68
<i>Lichter v. United States</i> , 334 U. S. 742.....	85, 173, 184
<i>Liverpool, N. Y. & P. S. S. Co. v. Emigration Commissioners</i> , 113 U. S. 33.....	91
<i>Madsen v. Kinsella</i> , No. 414, this Term.....	145
<i>Marion & Rye Valley Ry. v. United States</i> , 270 U. S. 286.....	74, 76
<i>Mayo v. Canning Co.</i> , 309 U. S. 310.....	51
<i>Mayor of New York v. Lord</i> , 18 Wend. 126.....	125, 129, 136
<i>McCulloch v. Maryland</i> , 4 Wheat. 316.....	95
<i>McDonald v. City of Red Wing</i> , 13 Minn. 38.....	125
<i>Meeker v. Van Rensselaer</i> , 15 Wend. 397.....	125
<i>Mercoid Corp. v. Mid-Continent Co.</i> , 320 U. S. 361.....	89
<i>Mississippi v. Johnson</i> , 4 Wall. 475.....	52
<i>Missouri v. Holland</i> , 252 U. S. 416.....	96
<i>Mitchell v. Harmony</i> , 13 How. 115.....	105, 126, 129, 131, 136
<i>Monongahela Navigation Co. v. United States</i> , 148 U. S. 312.....	72
<i>Moody v. Wickard</i> , 180 F. 2d 801, certiorari denied, 320 U. S. 775.....	61
<i>Morgan v. Nelson</i> , 43 Ala. 586.....	106
<i>Morton Salt Co. v. Suppiger Co.</i> , 314 U. S. 488.....	89

Cases—Continued

	Page
<i>Moyer v. Pezbody</i> , 212 U. S. 78.....	174
<i>Myers v. United States</i> , 272 U. S. 52.....	99
<i>Neagle, In re</i> , 135 U. S. 1.....	98, 100; 144, 148
<i>New York City v. Pine</i> , 185 U. S. 93.....	89
<i>New York v. United States</i> , 326 U. S. 572.....	174
<i>New York Trust Co. v. Eisner</i> , 256 U. S. 345.....	121
<i>Niagara Falls Bridge Commission v. United States</i> , 111 C. Cls. 338.....	66
<i>Oro Fino Consolidated Mines, Inc. v. United States</i> , 118 C. Cls. 18, certiorari denied, 341 U. S. 948.....	65
<i>Parham v. The Justices</i> , 9 Ga. 341.....	125, 126, 136
<i>Pennsylvania v. Williams</i> , 294 U. S. 176.....	89
<i>Pewee Coal Co. v. United States</i> , 115 C. Cls. 626, 88 F. Supp. 426, affirmed, 341 U. S. 114.....	56, 67, 76
<i>Phelps v. United States</i> , 274 U. S. 341.....	55
<i>Philippine Sugar Estates Development Co. v. United States</i> , 39 C. Cls. 225, 40 C. Cls. 33.....	138
<i>Portsmouth Co. v. United States</i> , 260 U. S. 327.....	67
<i>Prize Cases, The</i> , 2 Bl. 635.....	97
<i>Quirin, Ex parte</i> , 317 U. S. 1.....	145
<i>Railroad Commission v. Pullman Co.</i> , 312 U. S. 496.....	89
<i>Rescue Army v. Municipal Court</i> , 331 U. S. 549.....	27, 51, 53, 91
<i>Respublica v. Sparhawk</i> , 9 Dall. 357.....	124, 125, 136
<i>Rice E. Adams v. Lathrop</i> , 278 U. S. 509.....	89
<i>Roxford Knitting Co. v. Moore & Tierney</i> , 265 Fed. 177.....	139
<i>Russell v. Mayor of New York</i> , 2 Den. 461 (1845).....	125
<i>Seaboard Airline Ry. v. United States</i> , 261 U. S. 299.....	72
<i>Sherr v. Anaconda Wire & Cable Co.</i> , 149 F. 2d 680.....	68
<i>Shoshone Tribe v. United States</i> , 299 U. S. 476.....	65
<i>Siteseah-American Corp. v. Clark</i> , 332 U. S. 469 (affirming 156 F. 2d 793).....	68
<i>Slaback v. Cushman</i> , 12 Fla. 472.....	106
<i>State ex rel. Burnquist v. District Court</i> , 141 Minn. 1.....	52
<i>State Road Department of Florida v. United States</i> , 166 F. 2d 843.....	61
<i>Steward Machine Co. v. Davis</i> , 301 U. S. 548.....	174
<i>Stubbs v. United States</i> , 21 F. Supp. 1007.....	60
<i>Surocco v. Geary</i> , 3 Cal. 69 (1853).....	125
<i>Taylor v. Nashville & Chattanooga Railroad Co.</i> , 6 Cold. (Tenn.) 646.....	131, 136
<i>Tempel v. United States</i> , 248 U. S. 121.....	55
<i>Tennessee Valley Authority v. Tennessee Electric Power Co.</i> , 90 F. 2d 885, certiorari denied, 301 U. S. 710.....	86
<i>Thayer v. United States</i> , 20 C. Cls. 137.....	66
<i>315 West 97th Street Realty Co. v. Bowles</i> , 156 F. 2d 982, certiorari denied, 329 U. S. 801.....	83
<i>Tilden v. United States</i> , 10 F. Supp. 377.....	60

Cases—Continued

Page

<i>Trial of Thomas Cooper, Wharton's State Trials of the United States</i> , pp. 659, 662	52
<i>United States v. Cauby</i> , 328 U. S. 256	55, 67
<i>United States v. Commodities Trading Corp.</i> , 339 U. S. 121	85
<i>United States v. Corrick</i> , 298 U. S. 435	67
<i>United States v. Curtiss-Wright Export Corp.</i> , 299 U. S. 304	99
<i>United States v. Dickinson</i> , 331 U. S. 745	55, 60
<i>United States v. Georgia Marble Co.</i> , 106 F. 2d 955	71
<i>United States v. Great Falls Mfg. Co.</i> , 112 U. S. 645	55, 128
<i>United States v. Kansas City Ins. Co.</i> , 339 U. S. 799	55
<i>United States v. Lynah</i> , 188 U. S. 445	55, 65, 72, 128
<i>United States v. Macdaniel</i> , 7 Pet. 1	121
<i>United States v. MacFarland</i> , 15 F. 2d 823	140
<i>United States v. Merchants Transfer & Storage Co.</i> , 144 F. 2d 324	61
<i>United States v. Midwest Oil Co.</i> , 236 U. S. 459	112, 121
<i>United States v. Mine Workers</i> , 330 U. S. 258	73
<i>United States v. Montgomery Ward & Co.</i> , 150 F. 2d 369, vacated as moot, 326 U. S. 690	103
<i>United States v. North American Transp. & Trading Co.</i> , 253 U. S. 330	55, 60, 65
<i>United States v. Pacific Railroad</i> , 120 U. S. 227	132, 134, 135, 136
<i>United States v. Pewee Coal Co.</i> , 341 U. S. 114	67, 73, 74, 78, 79, 140
<i>United States v. Pink</i> , 315 U. S. 203	99
<i>United States v. Russell</i> , 13 Wall. 623	94, 98, 122, 134, 136, 139
<i>United States v. South Buffalo R. Co.</i> , 333 U. S. 771	158
<i>United States v. Sponenbarger</i> , 308 U. S. 258	77
<i>United States v. United Mine Workers</i> , 330 U. S. 258	102
<i>United States v. Wheelock Bros., Inc.</i> , 341 U. S. 319	68
<i>United States ex rel. Greathouse v. Dern</i> , 289 U. S. 352	89
<i>Virginian Ry. Co. v. System Federation</i> , 300 U. S. 515	86, 89
<i>Wallace v. City of Richmond</i> , 94 Va. 204	131
<i>Wellman v. Wickerman</i> , 44 Mo. 484	131
<i>Wheelock Bros., Inc. v. United States</i> , 115 C. Cls. 733, 88 F. Supp. 278	74
<i>Wiggins v. United States</i> , 3 C. Cls. 412	134
<i>Williams v. Fanning</i> , 332 U. S. 490	53
<i>Woods v. Miller Co.</i> , 333 U. S. 138	101
<i>Yakus v. United States</i> , 321 U. S. 414	27, 83, 94, 86, 152, 173
<i>Yearsley v. W. A. Ros. Construction Co.</i> , 309 U. S. 18	55, 63, 68

Constitution, Statutes, Treaties:

Constitution of the United States:

Article II	95, 96
Section 1	2, 27, 96, 97, 98
Section 2	3, 97
Section 3	4, 98

Constitution, Statutes, Treaties—Continued

Page

Article IV:

Section 4..... 28

First Amendment..... 103

Fourth Amendment..... 103

Fifth Amendment..... 4

Sixth Amendment..... 103

Act of March 11, 1852, 10 Stat. 727..... 128

Act of January 31, 1862, 12 Stat. 334..... 112

Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. 257..... 59

Act of July 16, 1918, 40 Stat. 904..... 114

Declaration of Taking Act (Act of Feb. 26, 1931, 46 Stat. 1421, 40 U. S. C. 258a)..... 58

Defense Production Act of 1950 (P. L. No. 774, 81st Cong., 2d Sess.)..... 58, 147

Defense Production Act of 1950 as amended (64 Stat. 799, 65 Stat. 132, 50 U. S. C. A. App. 2081):

Section 201..... 57, 58

201 (b)..... 62

401..... 147

402 (a)..... 83

402 (b) (2)..... 85

402 (d) (4)..... 24

407..... 84

408..... 84

501..... 152, 154

503..... 155

708..... 83

Title III..... 44

Title IV..... 48

Title V..... 156, 157

Defense Production Act Amendments of 1951 (P. L. No. 96, 82d Cong., 1st Sess.)..... 58, 154, 155, 158

Section 102..... 148

Economic Cooperation of 1948, 62 Stat. 137..... 31

Emergency Powers Interim Continuation Act, P. L. 313, 82d Cong., 2d Sess., 66 Stat. 54, April 14, 1952..... 22

Greek and Turkish Assistance Act of May 22, 1947, 61 Stat. 163..... 31

Labor Management Relations Act, 61 Stat. 136, 155, 29 U. S. C. Supp. IV, 176:

Section 206..... 151, 153, 160

208..... 153, 160

209 (a)..... 161

209 (b)..... 161

210..... 161

Mississippi River Flood Control Act of May 15, 1928, Sec. 4, 45 Stat. 530..... 62

Constitution, Statutes, Treaties—Continued

	Page
Mutual Defense Assistance Act of 1949, 63 Stat. 714.....	33
Mutual Security Act of 1951 (P. L. 165, 82d Cong., 1st Sess., October 10, 1951).....	33
River and Harbor Act of 1918, Sec. 5, 43 Stat. 911.....	62
Selective Service Act of 1948 (62 Stat. 625, 50 U. S. C. App., Supp. IV, 468):	
Section 18.....	57, 148
Tort Claims Act (28 U. S. C. 2680 (a)).....	70
Universal Military Training and Service Act (Title I of P. L. 51, 82d Cong., 1st Sess.).....	146
28 U. S. C.:	
1491.....	55, 69, 74
1491 (1), (4).....	55
1491 (3).....	55, 76
War Labor Disputes Act of June 25, 1943, 57 Stat. 463, 50 U. S. C. App. 1501-1511.....	109, 114, 171
North Atlantic Treaty of April 4, 1949, 63 Stat. 2241.....	32
Congressional Material:	
Annals of Cong., 6th Cong., col. 613.....	99
Charter of Organization of American States, Executive A, 81st Cong., 1st Sess.....	34
Cong. Globe, 30th Cong., 2d Sess., 580-581.....	128
Cong. Globe, 32d Cong., 1st Sess., 663.....	129
Cong. Globe, 37th Cong., 2d Sess.:	
p. 509.....	113
p. 510.....	114
p. 512.....	114
p. 516.....	114
p. 520.....	114
p. 548.....	113
Cong. Globe, 40th Cong., 3d Sess., 274, 293, 381.....	132
Cong. Globe, 41st Cong., 3d Sess., 97, 165, 295, 311.....	132
56 Cong. Rec. 9064.....	114
87 Cong. Rec.:	
p. 4736.....	115
p. 4932.....	115
p. 5895.....	116
p. 5901.....	117
p. 5910.....	117
p. 5972.....	116
p. 5974.....	116
p. 5975.....	117
p. 6331.....	115
p. 6424.....	115
89 Cong. Rec.:	
p. 3807.....	118
p. 3885.....	119

Congressional Material—Continued

	Page
p. 3887	119
p. 3896	118
p. 3989	119
p. 3992	109, 119, 149
p. 3993	119
93 Cong. Rec. :	
pp. 3835-3836	170
p. 3836	161
p. 4262	161
pp. 4594, 5012, 5115	154
97 Cong. Rec. 8390-8415	158
98 Cong. Rec. (unbound) :	
pp. 3225-26, 3418-19, 3461	164
p. 4192, April 21, 1952	19, 167
pp. 4258-4261, April 22, 1952	22
H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 63-65	154
H. Conc. Res. 207, introduced on April 9, 1952	21
H. Conc. Res. 209, introduced on April 22, 1952	21
H. Conc. Res. 210, introduced on April 22, 1952	21
H. Doc. No. 354, 82d Cong., 2d Sess., February 14, 1952	163
H. Doc. No. 422, 82d Cong., 2d Sess., 98 Cong. Rec. 3962	18, 93
Hearings before the Senate Committee on Foreign Relations on a bill to amend the Mutual Security Act of 1951, 82d Cong., 2d Sess., p. 361	45
Hearings before a Subcommittee of H. R. Committee on Education and Labor on Disputes Functions of the Wage Stabilization Board, 82d Cong., 1st Sess.	158
Hearing before a Subcommittee on Labor and Labor-Man- agement Relations, Senate Committee on Labor and Pub- lic Welfare, 82d Cong., 2d Sess.	7
H. J. Res. 431, introduced on April 22, 1952	21
H. J. Res. 433, introduced on April 24, 1952	21
H. J. Res. 441, introduced on May 1, 1952	21
H. J. Res. 442, introduced on May 1, 1952	21
H. R. 3020, 80th Cong., 1st Sess., as reported in H. Rep. No. 245	154
H. R. 6854, as amended on April 29, 1952, 98 Cong. Rec. 4617	21
H. R. 6947, as amended on April 22, 1952, 98 Cong. Rec. 4267	21
H. R. 7449, introduced on April 8, 1952	21
H. R. 7151, as amended on April 29, 1952, 98 Cong. Rec. 4628	21
H. R. 7572, introduced on April 24, 1952	21
H. R. 7579, introduced on April 24, 1952	21
H. R. 7622, introduced on April 28, 1952	21
H. R. 7647, introduced on April 30, 1952	21

Congressional Material—Continued

	Page
H. R. 7697 and 7698, both introduced on May 1, 1952	21
H. Rep. No. 262, 43d Cong., 1st Sess.	131
H. Rep. 127, 82d Cong., 1st Sess., pp. 55-62	101
H. Rep. No. 458, 30th Cong., 1st Sess.	128
H. Rep. No. 639, 82d Cong., 1st Sess.	58, 158, 159
H. Rep. 785, 78th Cong.	115
H. Rep. No. 872, 82d Cong., 1st Sess., p. 5	145, 146
H. Rep. No. 2759, 81st Cong., 2d Sess., p. 5	145
H. Res. 604, introduced on April 22, 1952	21
H. Res. 605, introduced on April 22, 1952	21
H. Res. 607, introduced on April 23, 1952	21
H. Res. 609, introduced on April 24, 1952	21
H. Res. 610, introduced on April 24, 1952	21
H. Res. 614, introduced on April 28, 1952	21
H. Res. 627, introduced on May 1, 1952	21
S. 1126, 80th Cong., 1st Sess., Secs. 206, 208, as reported in S. Rep. No. 105	154
S. 1524, antending Selective Service Act (87 Cong. Rec. 4932)	115
S. 1600 (87 Cong. Rec. 4736)	115
S. 2054, introduced by Senator Connally, November 1941	115
S. 2909, introduced by Senator Morse on April 9, 1952	20
S. 3016, introduced by Senator Morse on April 16, 1952	20
S. 3106, introduced on May 5, 1952	21
Senate Documents:	
Executives B, C, and D, 82d Cong., 2d Sess.	34
Executive E, 82d Cong., 2d Sess.	32
Sen. Misc. Docs. No. 11, 30th Cong., 1st Sess.	128
S. Rep. No. 105, 80th Cong., 1st Sess., p. 15	161
S. Rep. No. 117, 82d Cong., 1st Sess.	145, 146
S. Rep. 147, 78th Cong., 1st Sess.	117
S. Rep. No. 479, 82d Cong., 1st Sess., p. 15	158
S. Rep. 1037, 82d Cong., 1st Sess.	157, 158, 159, 162
S. Rep. No. 2250, 81st Cong., 2d Sess.	156, 157
S. Res. 306, proposed April 16, 1952	20
Testimony of Attorney General Biddle, Hearings, House Select Committee To Investigate Montgomery Ward Seizure, 78th Cong., 2d Sess., pursuant to H. Res. 521, June 8, 1944, pp. 167-168	107
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Testimony of John A. Stephens before Senate Committee on Labor and Public Welfare, April 22, 1952, stenographic transcript, volume 3, p. 274	80

Miscellaneous:

American State Papers, Class IX, Claims:

	Page
No. 83, p. 197	104
No. 243, p. 424	104
No. 258, p. 441	104
No. 266, p. 446	104
No. 345, p. 521	104
No. 356, p. 525	104
No. 461, p. 649	104
No. 584, p. 833	104
No. 590, p. 838	104

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Vol. 8, pp. 401-402

107

Berdahl, *War Powers of the Executive:*

pp. 68-70	108
p. 172	108
p. 200	108

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pp. 210-213

111
112

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Pricing Standards, Office of Temporary Controls, Office
of Price Administration (Historical Reports on War
Administration: Office of Price Administration, Gen-
eral Publication No. 7) (1947), c. 2, "Industry
Earnings Standard", pp. 27-89

84

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125

Corwin, *President, Office and Powers* (1948 ed.) 106, 108, 110, 111

David, *Municipal Liability in Tort in California*, 6 S. Cal.
L. R. 269

125

Executive Order 8773, June 9, 1941

109

Executive Order 8868, August 23, 1941

109

Executive Order 8928, October 30, 1941

109

Executive Order 8944, November 19, 1941

109

Executive Order 9108, March 21, 1942

109

Executive Order 9141, April 18, 1942

109

Executive Order 9220, August 13, 1942

109

Executive Order 9225, August 19, 1942

109

Executive Order 9254, October 12, 1942

109

Executive Order 9340, May 1, 1943

109, 140

Executive Order 9341, May 13, 1943

109

Executive Order 9351, June 14, 1943

109

Executive Order 9438, 9 F. R. 4459, April 25, 1944

119

Executive Order 10233 (16 F. R. 3503)

5, 157, 163

Executive Order 10340, 17 F. R. 3139, issued on April 8,
1952

4, 29, 59, 97

15 Fed. Reg. 9029

37

17 Fed. Reg. 3235

23

The Federalist, Nos. 70 and 71

97

Miscellaneous—Continued.

	Page
7 Hamilton, <i>Works of Alexander Hamilton</i> (1851), pp. 80-81	100
Letter to James C. Conkling, Aug. 26, 1863, IX Nicolay and Hay, <i>Works of Abraham Lincoln</i> , 95 at 98	106
Charles E. Hughes, <i>War Powers under the Constitution</i> , 42 A. B. A. Rep. 232	174
Nathanson, <i>Problems in Price Control:</i>	
<i>Legal Phases</i> , Office of Temporary Controls, Office of Price Administration (Historical Reports on War Administration: Office of Price Administration, General Publication No. 11) (1947), pp. 5 ff.	84
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April 9, 1952, p. 1, col. 8	22
April 10, 1952, p. 1, col. 8	22
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April 11, 1952, p. 1, col. 8	23
April 19, 1952, p. 1, col. 8	23
April 21, 1952, p. 1, col. 8	23
p. 22, col. 3	23
April 28, 1952, p. 28, col. 1	24
April 30, 1952, p. 1, col. 6-7	24
p. 20, col. 1	24
May 2, 1952, p. 1, col. 6-7-8	24, 52
May 3, 1952, p. 1, col. 8	25
May 4, 1952, p. 1, col. 7	25
May 5, 1952, p. 1, col. 8	25
May 6, 1952, p. 22, col. 8	25
39 Op. A. G. 343	92, 120
40-Op. A. G. 312	119
Panel Report of the Wage Stabilization Board, March 43, 1952	7, 81
President's letter of April 21, 1952, 98 Cong. Rec. 4192	93
President's Message to the Congress on April 9, 1952	47
Press Release, OPS, dated February 19, 1952, "Re: Application of OPS Industry Earnings Standard", particularly Price Operations Memorandum No. 25. Subject: "Industry Earnings Standard"	82
Report and Recommendations of the Wage Stabilization Board, dated March 20, 1952, pp. 16 ff.	6, 7, 80
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Miscellaneous—Continued.

Page

Statement of Attorney General Jackson, June 10, 1941, 89

Cong. Rec. 3992

98

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before Senate Committee on Labor and Public Welfare,

April 16, 1952, Sen. Doc. No. 118, 82d Cong., 2d Sess.

81

p. 2

81

p. 3

82

p. 6

80

pp. 6-7

7

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100

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chap. 39, p. 415

171

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97

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36

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p. 16

35

p. 18

35

p. 24

35

pp. 24-25

36

p. 66

36

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105

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pp. 88-89

108

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108

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96

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111

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 745

CHARLES SAWYER, SECRETARY OF COMMERCE,
PETITIONER

v.

THE YOUNGSTOWN SHEET AND TUBE COMPANY,
ET AL.¹

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 63-76) is not yet reported. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 447-449), on consideration of motions for stays, is not yet reported.

JURISDICTION

The orders of the District Court were entered on April 30, 1952 (R. 76). On April 30, 1952, petitioner filed notice of appeal and docketed the

¹ Since respondents herein have filed a petition in No. 744 we shall, to avoid confusion, refer to them as "plaintiffs."

appeal with the Court of Appeals for the District of Columbia Circuit (R. 77). The petition for certiorari was filed, prior to judgment by the Court of Appeals, on May 2, 1952 (R. 456.) Certiorari was granted on May 3, 1952. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, on the facts recited in Executive Order No. 10340 and established by the uncontroverted affidavits, the President had constitutional authority to take possession of plaintiffs' steel mills in order to avert an imminent nationwide cessation of steel production.
2. Whether, in the circumstances of this case, the district court erred in reaching and deciding the constitutional issues on motions for preliminary injunctions.
3. Whether the district court erred in granting injunctive relief.

CONSTITUTIONAL PROVISIONS AND EXECUTIVE ORDER INVOLVED

Article II of the Constitution provides, in pertinent part:

SECTION 4. The executive Power shall be vested in a President of the United States of America. * * *

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: "I do solemnly swear (or

affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

* * * * *

SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

* * * * *

The Fifth Amendment provides:

No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Executive Order 10340, and orders issued pursuant thereto, are set out at R. 6, 22.

STATEMENT

These arg. proceedings for injunctive relief against the petitioner, the Secretary of Commerce, to restrain through him the action of the President in ordering the taking of possession and operation of certain of plaintiffs' properties by Executive Order 10340, 17 F. R. 3139, issued on April 8, 1952. The underlying circumstances and the proceedings below are as follows:

1. THE WAGE DISPUTE

On November 1, 1951, plaintiffs' employees, represented by the United Steelworkers of America, C. I. O., which had a collective bargaining agreement due to expire on December 31, 1951, gave notice to the plaintiffs that they wished in a proposed new collective bargaining agreement between the parties to effect changes in wages and working conditions over those established by the old contract. (R. 3, 81). No progress was made in the negotiations which followed and, on December 22, 1951, the dispute was referred by the President to the Wage Stabilization Board, in accordance with the provisions of Executive Order 10233, 16 F. R. 3503. The Presidential letter of referral, a copy of which is attached to the affidavit of Mr. Harry Weiss, Executive Director of the Wage Stabilization Board, requested the Board to investigate the dispute and promptly to report with recommendations as to fair and equitable terms of settlement.² The President noted that the union and the steel producers had made

² The Presidential letter of referral, the report of March 13, 1952, by the Steel Panel which heard the presentation of steel wage dispute, and the "Report and Recommendations" of the Wage Stabilization Board of March 20, 1952, all of which are contained in the certified transcript of record as appendices to the affidavit of Mr. Harry Weiss (R. 59-61), were omitted in printing the record. Copies of these documents have been assembled and deposited with the Clerk for the Court's use.

no progress in resolving their differences and that it appeared unlikely that further bargaining or mediation and conciliation would suffice to avoid early and serious production losses in the vital steel industry. The President emphasized that the entire progress of national defense was threatened because any work stoppage would paralyze the entire steel industry and have an immediate and serious impact on the defense effort.

Pursuant to the referral, the Board immediately appointed a tripartite special steel panel (consisting of representatives of the public, of industry, and of labor) to hear all evidence and argument in the dispute and to make such reports as the Board might direct (R. 59). After a procedural meeting, public hearings were held in Washington, D. C., and New York City beginning on January 10, and continuing until February 16 (R. 60). The participating parties and the masses of evidence and argument heard are indicated by the Panel Report, dated March 13, 1952, a copy of which is attached to Mr. Weiss' affidavit. This Panel Report outlined the issues in dispute, summarized the position of the parties, and was submitted to the parties for consideration and comment. Meanwhile, the Board met and prepared the "Report and Recommendations of the Wage Stabilization Board," dated March 20, 1952, and submitted it to the President on that

date. A copy of the Board Report is attached to the affidavit of Mr. Weiss. The Board's recommendations, acceptable to the union, were rejected by steel management (R. 81).²

² Rejection of the Board's recommendations by plaintiffs was consistent with their position from the outset of the dispute. As stated by the Chairman of the Board in the March 20 report (pp. 5-6), after reviewing the critical nature of any labor dispute in the key steel industry, the "situation clearly called for unusually extensive bargaining. Instead, there was virtually no bargaining." On the major issues, such as wages, fringe benefits, etc., plaintiffs made no counter proposals, at least until after March 20, 1952. Report, pp. 6-7; Panel Report, March 13, 1952, *passim*. The need for bargaining in the best faith was underscored by the fact that the dispute presented the first occasion since 1947 for thorough review and revision of the collective bargaining agreements between the parties (Report, March 20, p. 5), and the fact that the Board's recommendations to the President were of a "catch-up" nature, designed to equate the position of steel workers with workers in comparable industries. Testimony of Nathan P. Feinsinger, Chairman, Wage Stabilization Board, Hearing before Subcommittee on Labor and Labor-Management Relations, Senate Committee on Labor and Public Welfare, 82d Cong., 2d Sess., March 31, 1952. See also Steel Panel Report, *passim*; Staff Report to Subcommittee on Labor and Labor-Management Relations, Senate Committee on Labor and Public Welfare, Senate Document 122, 82d Cong., 2d Sess. Perhaps, a principal stumbling block was the position taken by plaintiffs that any increase in wages required a compensating increase in price, a position which Price Stabilization officials deemed absolutely destructive of the present stabilization program. See Statement on Steel by Ellis Arnall, Director of Price Stabilization, before the Senate Committee on Labor and Public Welfare, Senate Document No. 118, 82d Cong., 2d Sess., pp. 6-7, and *passim*.

2. THE SEIZURE

As noted above, no progress was made in negotiations between the parties pursuant to the union's notice of November 1, 1951, and a strike was called, as contemplated by the notice, for December 31, 1951. After the President's referral of the dispute to the Wage Stabilization Board on December 22, 1951, the union voluntarily deferred the strike which had previously been set. After plaintiffs' refusal to accept the Board's recommendations, the strike was called for 12:01 A. M., April 9, 1952 (R. 7). Ninety-six hours' notice had been given; the mill were closing and the fires were being banked. The resulting catastrophic threat to steel production was averted by the Executive Order issued by the President directing the Secretary of Commerce to take possession of the steel industry on the night of April 8, 1952. The Secretary of Commerce thereupon issued Order No. 1 taking possession of the plants, facilities and other properties of plaintiffs and numerous other steel companies (R. 22). The Order, and the accompanying telegrams sent to the companies, designated the president or chief executive officer of each company as the Operating Manager for the United States and directed that the management's officers and employees of the plants continue their functions (R. 21).

The union immediately called off the contemplated strike and full-scale production of steel continued without interruption until April 29, 1952 after the issuance of Judge Pine's decision in the District Court. See *infra*, pp. 22-24.

In his Executive Order, the President set forth his findings that steel is an indispensable component of substantially all the weapons used by the armed forces, that it is indispensable in carrying out the programs of the Atomic Energy Commission, and that a continuing and uninterrupted supply of steel is indispensable for the maintenance of the civilian economy of the United States upon which our military strength depends (R. 6-9). He concluded with the finding that

a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field and that in order to avert these dangers it

is necessary that the United States take possession of and operate the plants, facilities and other properties of [the plaintiffs].

The affidavits filed below by petitioner, which were not controverted, spell out in greater detail these findings of the President. Secretary of Defense Lovett, the cabinet officer most directly concerned with all problems of armed forces

procurement and development, points out, in his affidavit, the following (R. 27-31): That an adequate and continuing supply of steel is essential to every phase of our defense production effort at home, including the ever increasing needs of troop training; that a continuing steel supply is essential to the effectiveness, safety and very existence of the armed forces fighting in Korea and stationed elsewhere overseas as part of our effort in world defense; and that no cessation of steel production can fail to add materially to the risk, from a military point of view, to which we are already subject by reason of the "stretch out" of our armament program and as a result of which we are barely able to meet our defense goals. Secretary Lovett, after disclosing, to the extent permitted by the grave considerations of security which are involved in any information of this type, the large percentage of steel production which goes into current defense requirements, emphasized the almost unbelievable extent to which our entire combat technique depends on the fullest use and availability of industrial strength and the use of vastly improved weapons, by reason of which he stated that "we are holding the line [in Korea] with ammunition and not with the lives of our troops" (R. 30). From all of these factors, Secretary Lovett concluded that any curtailment in the production of steel, even for a short period of time, would im-

peril the safety of our fighting men and that of the nation.

Again, the grave effect of any interruption in steel production on the national safety and defense efforts is sharply emphasized in the affidavit of Mr. Gordon Dean, Chairman of the Atomic Energy Commission (R. 31-33).⁴ Mr. Dean, referring to the current major expansion of construction facilities for the production of atomic weapons, points out that success is governed by the completion of the facilities construction program on schedule; that time has already been lost and must be recovered; that the most varied and unusual types of structural steel and stainless steel must be continuously available; that inventories of materials needed for such critical projects as development of A. E. C. construction sites are abnormally low; and that, consequently, any cessation of deliveries of steel will have the critical effect of causing an inability to step up the production of atomic weapons to the rate required to meet goals established by the President.

Mr. Henry H. Fowler, Administrator of the National Production Authority, deposes (R. 34-38) that the products of the iron and steel industry are indispensable in the manufacture of

⁴As indicated above, serious security problems are presented in furnishing any detailed information as to the effect of a cessation of steel production on defense production schedules and needs. This consideration is particularly apposite in the case of the Atomic Energy Commission.

military weapons and equipment and in the production of items required for defense-supporting programs such as those of the Atomic Energy Commission and the construction and expansion of power plants and of steel and aluminum facilities for production of railroad equipment, ships, machine tools and the like. He points out that the effect of a stoppage of steel production would vary according to inventories available to the manufacturers but in any event would quickly diminish the volume of output. Because of inventory shortages there would be an immediate slow-down in the manufacture of certain types of ammunition and with respect to certain essential programs of the Atomic Energy Commission, which is in short supply on certain vital specialty items. The production of anti-friction-bearings, mechanical power transmissions and aircraft fasteners would be quickly affected, resulting in the immediate curtailment and early shut-down of the production of aircraft, tanks and other military equipment. The same is true as to the production of air valves required for the production program of the Atomic Energy Commission. With respect to heavy power and electrical equipment, such as engines, turbines, motors, power transformers, the situation is similarly critical; shipment of such equipment would be discontinued within one to three weeks after a production stoppage and Mr. Fowler estimates that "even a one week's stoppage would cause as much as one

month's delay in the production of engines and turbines." This in turn would have serious effects upon the programs of the Atomic Energy Commission, the Navy's mine sweeper program and the power, aluminum and steel expansion programs. The production of electronic equipment used for military purposes also would be immediately and seriously affected, and any loss in this field would be irretrievable.

Secretary of Commerce Sawyer's affidavit (R. 49-59) discloses the critical impact which a major stoppage in steel production would have on the transportation programs of the Maritime Administration, the Civil Aeronautics Administration, and the Bureau of Public Roads. He points out that a ten-day interruption in steel production would result in the loss of 96,000 feet of bridge and 1,500 miles of highway, that a twenty-day interruption would result in the loss of 149,000 feet of bridge and 2,280 miles of highway, and that a thirty-day interruption would result in the loss of 196,000 feet of bridge and 2,950 miles of highway; that the highway construction program, vital in defense plant and training areas, cannot continue production from inventory, and that steel for highways and bridges is ordered for specific use, delivered for specific use, and if it is not produced and delivered the program is delayed. With respect to the effect of a steel shut-down on the shipbuilding program, Secretary Sawyer states that of the 98 ships currently in

varying degrees of construction, there is sufficient steel in the yards to permit completion of only 21 of the ships, and that 39 ships are in such a stage of construction as to be directly dependent on the receipt of steel products during the present quarter. Further, Secretary Sawyer details the critical effect which a stoppage of steel production would have on the production of carrier and noncarrier aircraft. He emphasizes, with respect to production of transport type aircraft that should the production of certain components be delayed, it is anticipated that both the Convair and Douglas production lines would have to be stopped within 60 days; and that one manufacturer of aircraft has indicated that it would be preferable to close down his operations immediately rather than wait for the anticipated unavailability of a number of items to cause him to close.

Mr. Oscar L. Chapman, Secretary of the Interior, points out in considerable detail in his affidavit (R. 39-43) the drastic repercussions of any delay in deliveries of the various types of steel permitted by Defense Production Administration allotment orders to the petroleum, gas, and electric power utility fields. Most of the steel and steel products thus allocated are for maintenance and expansion of facilities for production and transportation, areas of activity which are obviously of the greatest importance not only for industrial use and expansion but for direct military use.

The factors involved in these considerations are elaborated in Mr. Chapman's affidavit. In addition, he sets forth the crucial importance of the continued availability of steel supplies for the maintenance, repair, and operation of coal mines and coke ovens. Failure of steel supplies would result in curtailment of power production necessary for defense and military uses and would also result in a progressively severe decline in the production and availability of coal for all purposes.⁵

3. COURT PROCEEDINGS

Immediately upon the issuance of Executive Order 10340, plaintiffs sought, by court order, to nullify the Presidential action thus taken to prevent the complete cessation of production in the steel industry.⁶ On the night of April 8, 1952, applications for temporary restraining orders

⁵ Further details of the impact upon our national security of a cessation of steel production are contained in the affidavits of Manly Fleischmann, Administrator of the Defense Production Authority (R. 33-34), Homer C. King, Acting Administrator of the Defense Transportation Administration (R. 46-48), and Jess Larson, General Services Administrator (R. 44-46).

⁶ Counsel for plaintiff Republic Steel Company advised the District Court that the plaintiffs produce 70% of the nation's steel (R. 291). In addition, a complaint making similar allegations has been filed by Inland Steel Company in the Northern District of Indiana, Hammond Division, Civil Action No. 1381, filed April 16, 1952. That action has been stayed by agreement pending disposition of the present cases.

were presented ex parte to Judge Bastian of the District Court for the District of Columbia. The Judge declined to take action without some notice to the Government, which notice was given on the morning of April 9. At 11:00 a. m., April 9, a hearing was held before Judge Holtzoff (R. 217-266). At the conclusion of the hearing, the applications for temporary restraining orders were denied (R. 128).

Briefly summarized, the complaints (R. 1, 80, 116, 134, 144, 154, 167) filed by the companies pray for declaratory judgment and injunctive relief, narrate the expiration of the wage agreement between plaintiffs and the union, the unproductive negotiations for a new contract, and the strike call of the steel-workers for April 9, 1952. They then allege the issuance of Executive Order No. 10340 (17 F. R. 3139) authorizing and directing Secretary Sawyer to seize the steel industry, and that Secretary Sawyer, in compliance with this order, has seized the steel industry. Plaintiffs aver that this seizure is illegal for want of any constitutional or statutory authority in the President to issue the Executive Order.

Plaintiffs conclude that the seizure of their plants constitutes an illegal invasion of their property rights, which exposes them to injuries for which monetary damages would afford inadequate compensation. The allegations of irreparable harm vary to some extent but center

around the apprehension that the seizures might interfere with plaintiffs' normal customer relations and destroy their good-will, that Secretary Sawyer might make improper use of plaintiffs' trade secrets, might place incompetent management in the plants which would wreck them physically and financially, and finally, that Secretary Sawyer might put into effect the recommendations of the Wage Stabilization Board as to wage increases or union security.

On April 24 and 25, 1952, hearings were held in the District Court before Judge Pine on plaintiffs' motions for preliminary injunctions seeking to restrain petitioner from taking any action under the authority of Executive Order No. 10340 (R. 217-439). Judge Pine announced his opinion and granted the motions on April 29, 1952 (R. 63-76).⁷ Formal orders were signed on April 30, 1952, and applications for stay were denied by Judge Pine (R. 76, 79). Notices of appeal were filed by petitioner on the same day in the Court of Appeals for the District of Colum-

⁷ At the hearing, plaintiff United States Steel orally modified its request for an injunction so as to pray only that Secretary Sawyer be restrained from making any changes in the terms and conditions of employment (R. 76). The affidavit of John A. Stephens, principally relied upon to show irreparable injury, was filed at the hearing in connection with this oral motion (R. 99-111). This modified request was denied by Judge Pine (R. 76).

bia Circuit and the appeals were docketed (R. 77, 428). Later that day, the Court of Appeals, *en banc*, issued an order staying the orders of the District Court until 4:30 P. M. Friday, May 2 (two days later) and if petition for certiorari were filed by that time, until this Court acted upon the petition for a writ of certiorari; and, if the petition were denied, until further order of the Court of Appeals (R. 444). On May 1, 1952, that Court, *en banc*, denied applications to modify its stay (R. 446). On May 2, 1952, the Court of Appeals filed an opinion in connection with the action taken by it on April 30 and May 1 (R. 447-449). On May 3, 1952, this Court granted certiorari and ordered a further stay pending disposition by this Court, with the provision that Secretary Sawyer "take no action to change any term or condition of employment while this stay is in effect unless such change is mutually agreed upon by the steel companies and the bargaining representatives of the employees" (R. 457).

4. EVENTS SUBSEQUENT TO SEIZURE

A. CONGRESSIONAL ACTIVITY

As an integral part of the action involved in seizure of plaintiffs' properties, the President, on the morning following the issuance of the Executive Order, dispatched a message to Congress.⁸ After reviewing the crisis which faced the

⁸ House Doc. 422, 82d Cong., 2d Sess., 98 Cong. Rec. 3962-3963, April 9, 1952.

Nation on the night of April 8, the President stated that "the idea of Government operation of the steel mills is thoroughly distasteful to me and I want to see it ended as soon as possible" but that, after canvassing the available alternatives, he had concluded that "Government operation of the steel mills for a temporary period was the least undesirable of the courses of action which lay open." The President suggested various courses of action which Congress might deem desirable and stated that he "would, of course, be glad to cooperate in developing any legislative proposals which the Congress may wish to consider." On April 21, 1932, the President sent a further communication to the Senate (98 Cong. Rec. 4192) in which he reiterated these statements. He further stated:

I also indicated that, if the Congress wished to take action, I would be glad to cooperate in developing any legislative proposals the Congress might wish to consider. That is still my position. I have no wish to prevent action by the Congress. I do ask that the Congress, if it takes action, do so in a manner that measures up to its responsibilities in the light of the critical situation which confronts this country and the whole free world.

I do not believe the Congress can meet its responsibilities simply by following a course of negation. The Congress cannot perform its constitutional functions simply

by paralyzing the operations of the Government in an emergency. The Congress can, if it wishes, reject the course of action I have followed in this matter. As I indicated in my message of April 9, I ordered Government operation of the mills only because the available alternatives seemed to me to be even worse. The Congress may have a different judgment. If it does, however, the Congress should do more than simply tell me what I should not do. It should pass affirmative legislation to provide a constructive course of action looking toward a solution of this matter which will be in the public interest.

Since April 9, there has been no definite or completed legislative response to the various suggestions made by the President in his message. One legislative proposal, S. 2999, introduced by Senator Morse on April 9, contained a broad and new procedure for seizure in the form of an amendment to the Labor Management Relations Act of 1947. A second bill, S. 3016, was introduced by Senator Morse on April 16, proposing a return of the mills to private owners upon acceptance of the recommendations of the Wage Stabilization Board or, alternatively, authorizing Secretary Sawyer to make those recommendations effective under his supervision. On the same day, a study by the Senate Judiciary Committee of the seizure problem was proposed. S. Res. 306. Hearings have been held before the Senate

Committee on Labor and Public Welfare and before a Special Subcommittee of the Senate Judiciary Committee. There has also been extensive debate in both Houses on an almost daily basis. In addition to these proposals, there has been a flurry of bills and resolutions utilizing various parliamentary devices.⁹ Three amendments to specific appropriation bills, designed to prevent use of appropriated funds for acquiring or operating any facility whose seizure is not authorized by act of Congress, were favorably voted on in the Senate and are presently in conference. Sec. 403, H. R. 6854, passed Senate as amended on April 29, 1952, 98 Cong. Rec. 4617; Sec. 707, H. R. 7151, passed Senate as amended on April 29, 1952, 98 Cong. Rec. 4626; Sec. 1305, H. R. 6947, passed Senate as amended on April 22, 1952, 98 Cong. Rec. 4267. On April 22, the day

⁹ See H. R. 7449, introduced on April 8, 1952; H. Con. Res. 207, introduced on April 9, 1952; H. Res. 604, introduced on April 22, 1952; H. Res. 605, introduced on April 22, 1952; H. Con. Res. 209, introduced on April 22, 1952; H. Con. Res. 210, introduced on April 22, 1952; H. J. Res. 431, introduced on April 22, 1952; H. Res. 607, introduced on April 23, 1952; H. R. 7572, introduced on April 24, 1952; H. R. 7579, introduced on April 24, 1952; H. Res. 609, introduced on April 24, 1952; H. Res. 610, introduced on April 24, 1952; H. J. Res. 433, introduced on April 24, 1952; H. R. 7622, introduced on April 28, 1952; H. Res. 614, introduced on April 28, 1952; H. R. 7647, introduced on April 30, 1952; H. R. 7697 and 7698, both introduced on May 1, 1952; H. J. Res. 441, introduced on May 1, 1952; H. J. Res. 442, introduced on May 1, 1952; H. Res. 627, introduced on May 1, 1952; S. 3106, introduced on May 5, 1952.

following Senate action amending the Third Supplemental Appropriation Bill for 1952 in this fashion, an effort to extend the prohibition to cover the use of any funds for expenditure during the fiscal year 1952 to implement any seizure unauthorized by Act of Congress, failed. 98 Cong. Rec. 4258-4261, April 22, 1952.¹⁰

R. COURSE OF NEGOTIATIONS

Immediately after the seizure of plaintiffs' properties, the President directed the Acting Director of Defense Mobilization, Dr. John R. Steelman, to arrange a meeting of representatives of the companies and the steel workers at the earliest possible date for a renewed attempt to settle the dispute.¹¹ The next day, the Acting Director of Defense Mobilization met with negotiators for the steel workers and the major steel companies.¹² During these negotiations, the President of the United Steelworkers of America, CIO, reiterated his telegraphic undertaking of the night of April 8. of union cooperation in

¹⁰ In considering this legislative activity, mention might be made of a cautionary provision inserted in the Emergency Powers Interim Continuation Act, Pub. L. 313, 82d Cong., 2d Sess., 66 Stat. 54, April 14, 1952. Section 5 of that statute provides: "Nothing contained herein shall be construed to authorize seizure by the Government, under authority of any Act herein extended, of any privately owned plants or facilities which are not public utilities." In making the present seizure the President did not rely on any of the Acts thus extended.

¹¹ N. Y. Times, April 9, 1952, p. 1, col. 8.

¹² N. Y. Times, April 10, p. 1, col. 8.

continued production of steel.¹³ The National Production Authority subsequently revoked orders freezing and controlling the delivery of steel for consumer goods and for export. 17 Fed. Reg. 3235.

The President indicated again, on April 10, his desire that negotiations continue between the companies and the union.¹⁴ Such negotiations, conducted under the supervision of Dr. Steelman, terminated on April 15 (R. 95). At his request, representatives of both the steel workers and the operators conferred with Secretary Sawyer on April 18, but a basic disagreement persisted on major issues, including the question of price increases for the companies, and Secretary Sawyer abandoned plans for convening a final joint meeting.¹⁵

After the failure of these negotiations, Secretary Sawyer indicated that he felt that he should, under the instructions of the President, undertake consideration of arranging appropriate terms and conditions of employment, although he stressed that the revelation of his intentions on this matter was not intended to serve as an ultimatum to the parties and that it should not be so interpreted.¹⁶

¹³ N. Y. Times, April 11, p. 15, col. 3.

¹⁴ N. Y. Times, April 11, p. 1, col. 8.

¹⁵ N. Y. Times, April 19, p. 1, col. 8.

¹⁶ N. Y. Times, April 21, p. 1, col. 8, p. 22, col. 3.

A further effort to encourage a settlement of the dispute by the companies and workers was made when the Economic Stabilization Administrator instructed the Director of Price Stabilization to perfect procedures for permitting price increases for the steel companies under the Capehart Amendment, Section 402 (d) (4), Defense Production Act of 1950, as amended, 50 U. S. C. A. App. Section 2102 (d) (4), issuance of which had been delayed at the request of the steel industry (R. 396). Simultaneously, Secretary Sawyer released for publication a letter to the Economic Stabilization Administrator requesting recommendations, for submission to the President, concerning appropriate terms and conditions of employment for the steel workers (R. 395).

Steel production continued at a high level during the seizure.¹⁷ However, immediately following the announcement of the district court's opinion, the union called its men out and the production stoppage, which the President sought to avert, began.¹⁸ During the subsequent short period of uncertainty, the steel companies and union leaders took no action on proposals by the Government that collective bargaining be resumed.¹⁹

On May 2, after an urgent message from the President, and Judge Pine's order having been stayed for the second time, the union cancelled

¹⁷ N. Y. Times, April 28; p. 28, col. 1.

¹⁸ N. Y. Times, April 30, p. 1, col. 6-7, p. 20, col. 1.

¹⁹ N. Y. Times, May 2, 1952, p. 1, col. 6-7-8.

its strike although several of the large steel companies announced unwillingness to resume production unless assurances were given that no further interruptions in work schedules would occur.²⁰ These companies subsequently indicated that they were undertaking a full resumption of operations on May 3.²¹

On May 2, the President sought personally to foster agreement between the companies and the workers and announced a conference to be held at the White House beginning on the morning of Saturday, May 3.²² These conferences continued until the afternoon of Sunday, May 4, when they collapsed.²³ Although no agreement could be concluded, the union announced that it would continue efforts to maintain production and the manufacture of steel appears to be continuing without interruption pending the arguments in this case.²⁴

ARGUMENT

INTRODUCTION

SUMMARY OF POSITION

The two issues in this case are (1) whether the district court properly granted injunctive relief in view of the great and urgent public inter-

²⁰ N. Y. Times, May 3, p. 1, col. 8.

²¹ N. Y. Times, May 4, p. 1, col. 7.

²² N. Y. Times, May 3, p. 1, col. 8.

²³ N. Y. Times, May 5, p. 1, col. 8.

²⁴ N. Y. Times, May 5, p. 1, col. 8; N. Y. Times, May 6, p. 22, col. 8.

ests which impelled the President's decision to seize the steel mills for the purpose of maintaining uninterrupted steel production; and (2) whether on the facts which the President found in the Executive Order, and which are established by uncontroverted affidavits, the President had power under the Constitution and laws to take possession of the plaintiffs' steel mills in order to avert an imminent nation-wide cessation of steel production.

We contend that the granting of injunctive relief by the district court was in clear violation of the applicable equitable principles. Plaintiffs had an adequate remedy at law by suit for just compensation in the Court of Claims. The formal concession of Government counsel, thrice-repeated, that such a suit may be brought and that no defense of lack of jurisdiction can or will be raised should, as a practical matter, be sufficient. *International Paper Co. v. United States*, 282 U. S. 399, 406. But in any event, such a suit could be maintained, either on the ground that where, as here, statutory warrant existed for a taking, just compensation will be allowed even though the particular procedures prescribed were not followed, *Hurley v. Kincaid*, 285 U. S. 95, or on the ground that wherever there has been an actual physical taking and where the Constitution directs that compensation be paid, the Court of Claims will entertain jurisdiction, at least where

the action was taken under a formal executive regulation.

Moreover, we think it quite doubtful whether the plaintiffs will suffer any damage, while it is certain that vital public interests will be damaged, and the lives, liberties and property of all the people will be put in jeopardy by the issuance of an injunction. Under such circumstances, it is clear that the application for preliminary injunction should have been denied on a balancing of the equities, without reaching the constitutional issues involved. *Yakus v. United States*, 321 U. S. 414, 440. And even final relief should be denied in the absence of a "clear showing" that equitable relief is necessary. *Hurley v. Kincaid*, *supra*, 104n. These principles are especially applicable to constitutional cases. Such cases will, if it is at all possible, be disposed of on non-constitutional grounds; a court will "undertake the most important and the most delicate of the Court's functions" only if "necessity compels it" to do so. *Rescue Army v. Municipal Court*, 331 U. S. 549, 569.

On the constitutional issue we contend that under Article II of the Constitution the President possessed power to seize the steel mills to avoid a cessation of steel production which would gravely endanger the national interests which it is his duty to protect. Specifically, we find such authority in the provisions of Article II, that "the executive Power shall be vested in a President of

the United States" (Section 1); that the President shall swear that he will "faithfully execute the Office" and will to the best of his ability "preserve, protect and defend the Constitution of the United States" (Section 1); that he "shall be Commander-in-Chief of the Army and Navy of the United States" (Section 2); that he shall be the sole organ of the Nation in its external relations (Sections 2 and 3); and that "he shall take Care that the Laws be faithfully executed" (Section 3).²⁵ In a subsequent part of this brief, we shall show from 150 years of American history that the President may act as he did under the conditions in which he did. We shall show further that no statutory enactment even purports to deprive him of the power so to act.

Underlying both sets of issues, however, are the circumstances in which the President acted. None of the questions here presented can be considered in the abstract. In particular, an understanding of the nature of the emergency to which the President's action was addressed is necessary to consideration of the question whether, upon a balancing of the equities, the enormous damage to vital public interests which might result from the granting of an injunction should lead a court of equity to stay its hand. It is equally necessary to a consideration of the constitutional issues.

²⁵ There are other provisions in the Constitution, which, although not constituting specific grants of power to the President, confer powers on him by implication. For example, Article IV, Section 4 guarantees every State against domestic violence:

For "while emergency does not create power, emergency may furnish the occasion for the exercise of power." *Home Building & Loan Association v. Blaisdell*, 290 U. S. 398, 426. Accordingly, we shall at the outset describe the national interests which the President sought to protect and the gravity of the injury to those interests which impelled him to act.

THE NATURE OF THE EMERGENCY

In his Executive Order, the President has made the following factual findings (among others):

WHEREAS American fighting men and fighting men of other nations of the United Nations are now engaged in deadly combat with the forces of aggression in Korea, and forces of the United States are stationed elsewhere overseas for the purpose of participating in the defense of the Atlantic Community against aggression; and

WHEREAS the weapons and other materials needed by our armed forces and by those joined with us in the defense of the free world are produced to a great extent in this country, and steel is an indispensable component of substantially all of such weapons and materials; and

WHEREAS steel is likewise indispensable to the carrying out of programs of the Atomic Energy Commission of vital importance to our defense efforts; and

WHEREAS a continuing and uninterrupted supply of steel is also indispensable to the maintenance of the economy of the

United States, upon which our military strength depends; and

* * * * *

WHEREAS a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field; and

* * * * *

These findings by the President describe a serious emergency. They have not been challenged by the plaintiffs nor contradicted by any findings of the district court, even assuming that they would be open to such challenge. Accordingly, they must be accepted as true.

These findings make it clear that the President has not asserted the power to seize private property out of whim or caprice, or with some vague idea that such an act would promote the general prosperity or well-being of the country. In this case, the President found that seizure of the steel plants was "necessary" to avert a work stoppage in the steel industry with the attendant cessation of steel production which "would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field." The seizure of the steel mills for this stated purpose was in discharge of

the President's duty to take care that the laws be faithfully executed—the laws in this case being a comprehensive scheme of statutes and treaties establishing and implementing the national policy to deter and repel aggression. Such seizure was also necessary to the effective discharge of the President's responsibilities as Commander in Chief of the armed forces and as the representative of the nation in foreign affairs.

The Military and Foreign Affairs Crisis.—The absolute necessity for continuous steel production which led to the President's seizure of the steel plants on April 8 arises from the fact that the military security of the United States and other countries is endangered by the aggressions of the Soviet Union and its satellite states.

Within a few years after World War II, the Soviet Union had succeeded in annexing Lithuania, Latvia and Esthonia, and in establishing in Poland, Rumania, Hungary, Bulgaria, and Czechoslovakia regimes which completely subordinated the interests of those countries to the interests of the Soviet Union. Similar threats to the independence of Greece and Turkey were averted only through American military and economic aid extended pursuant to the Greek and Turkish Assistance Act of May 22, 1947 (61 Stat. 103). Also, Soviet attempts to exploit the temporary weakness of the devastated nations of Western Europe were a large factor in the establishment of the European Recovery Program under which Amer-

ican economic aid was used to assist those countries in repairing and expanding their economies (62 Stat. 137). Iran maintained its territorial integrity in the face of Soviet aggression only through the efforts of the United Nations.

In 1949, the United States and most of the nations of western Europe decided that a program of economic rehabilitation was not enough. On April 4, 1949, there was signed the North Atlantic Treaty, under Article 5 of which the United States and the other signatory nations

* * * agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.²⁶

²⁶ The Senate ratified the North Atlantic Treaty in July 1949. The original North Atlantic Treaty of April 4, 1949, 63 Stat. 2241, includes, besides the United States, as parties the following: Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, and the United Kingdom. The scope of the treaty has been extended to include Greece and Turkey. S. Doc. Executive E, 82nd Congress, 2d session.

Congress has implemented the North Atlantic Treaty with the Mutual Defense Assistance Act of 1949, 63 Stat. 714, in which the Congress declared:

* * * that the efforts of the United States and other countries to promote peace and security in furtherance of the purposes of the Charter of the United Nations require additional measures of support based upon the principle of continuous and effective self help and mutual aid. * * *

In 1951, this was succeeded by the Mutual Security Act of 1951 (Public Law 165, 82d Cong., 1st Sess.) the stated purpose of which is

to maintain the security and to promote the foreign policy of the United States by authorizing military, economic, and technical assistance to friendly countries to strengthen the mutual security and individual and collective defenses of the free world, to develop their resources in the interest of their security and independence and the national interest of the United States and to facilitate the effective participation of those countries in the United Nations system for collective security.

The mutual security program has involved appropriations of approximately \$13 billion for the two fiscal years ending June 30, 1952. In fulfillment of the North Atlantic Treaty, the United States has stationed in western Europe, without

regard to the approaching end of the German occupation, the equivalent of six divisions plus certain naval and air units. Joint command arrangements, unprecedented except in time of war, have been made by the United States and its west European allies, with General Eisenhower as the first Commander.

More recently, the United States has entered into defense and security pacts with the Republic of the Philippines, Australia, New Zealand and Japan.²⁷ These agreements are intended to provide the basis for effective mutual defense in the Pacific area.

The Soviet Union has maintained since World War II ground forces much larger than those presently available to the United States and the countries joined with it in mutual security arrangements. In addition, the Soviet Union has maintained the largest air force in the world. In general, the Soviet Union has consistently devoted a much larger portion of its industrial production to military items than has any other country. In the years immediately following World War II, it was widely believed that the United States' exclusive possession of atomic weapons constituted a powerful deterrent to Soviet aggression. However, in 1949, the Soviet Union produced an atomic explosion.

²⁷ Senate Documents Executives B, C and D, 82d Cong., 2d Sess. See also Charter of Organization of American States, Executive A, 81st Cong., 1st Sess.

With the sudden and unprovoked attack of North Korean Communist forces upon the Republic of Korea on June 25, 1950, the United Nations, including the United States, were confronted with naked armed aggression. On June 25, 1950, the United Nations Security Council determined that the North Korean attack "constitutes a breach of the peace,"²⁸ On June 26, the President declared that "In accordance with the resolution of the Security Council, the United States will vigorously support the effort of the Council to terminate this serious breach of the peace." On June 27, the Security Council recommended "that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area."²⁹ On the same day, the President announced that "In these circumstances I have ordered United States air and sea forces to give the Korean Government troops cover and support."³⁰ On June 30, it was announced that the President "had authorized the United States Air Force to conduct missions on specific military targets in Northern Korea wherever militarily necessary and had ordered a Naval blockade of the entire Korean coast. General MacArthur had been an-

²⁸ *United States Policy in the Korean Crisis* (1950), Department of State Publication 3922, p. 16.

²⁹ *Ibid.*, p. 24.

³⁰ *Ibid.*, p. 18.

thorized to use certain supporting ground units."³¹ By its resolution of July 7, 1950, the Security Council recommended the creation of a unified command for the military forces of member states assisting in the defense of the Republic of Korea, and requested the United States to designate a commander.³²

As a result of these events, and pursuant to the decisions of the Security Council, the United States and other members of the United Nations, under the command of General MacArthur and later General Ridgway, have engaged in nearly two years of military operations to preserve the independence of the Republic of Korea. This task was greatly increased by the large-scale intervention of Chinese Communist forces in November 1950.³³ In addition, the Communist forces in Korea have been and are being steadily supplied by the Soviet Union with such items as military aircraft, tanks, guns and radar. The present situation in Korea is one in which the territorial integrity of the Republic of Korea has been substantially maintained, and there exists an uneasy and limited military truce during which negotiations for an armistice have been carried on without success since July 1951. The total casualties

³¹ Ibid., pp. 24-25.

³² Ibid., p. 66.

³³ On February 1, 1951, United Nations General Assembly branded the Chinese Communist intervention as an aggression. UN doc. A/1771:

in the United Nations forces to date are unofficially estimated to exceed 300,000, of which the American casualties are over 108,000. It is roughly estimated that resistance to Soviet aggression in Korea has cost the United States directly about 10 billion dollars.

As Ambassador Austin stated on April 21, 1951, "[The Korean conflict] has alerted people all over the world to the imminent dangers of Soviet aggression." In the domestic life of the United States, these grave events have evoked measures of control and partial mobilization unprecedented except in time of declared war. On December 16, 1950, one month after the Chinese Communists attacked the United Nations forces, the President proclaimed "the existence of a national emergency, which requires that the military, naval, air, and civilian defenses of this country be strengthened as speedily as possible to the end that we may be able to repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made through the United Nations and otherwise to bring about lasting peace."³⁴ The armed forces of the United States have been substantially increased, necessitating large-scale inductions pursuant to the Selective Service Act of 1948 and the recall of thousands of reservists. Congress has appropriated for our defense program, for

³⁴ 15 F. R. 9029.

our armed forces and for military assistance to our allies since the beginning of military operations in Korea in excess of \$130 billion. Recognizing the impact of such expenditures upon our economy, Congress in the Defense Production Act of 1950, as amended, provided for price and wage controls, allocation of materials, requisitioning powers and credit controls which are equally without peacetime precedent.

In fulfillment of the North Atlantic Treaty and the other security pacts to which the United States is a party, and the implementing acts of Congress, the United States has made many agreements with its allies which call for American economic and military aid to assist those countries to participate in effective mutual security arrangements to deter or repel aggression.

In brief, a world still suffering from the devastation of World War II is confronted by an aggressive Soviet Union commanding massive armaments. The attack upon Korea has demonstrated the willingness of the Soviet Union and its satellites to employ military force for conquest. The United States and the other free nations of the world have resolved that the only hope of deterring aggression and thereby avoiding subjugation or, at the best, a great war, is to place themselves in a military posture which will make military adventures too dangerous. They have also resolved to repel any aggression

which may be attempted. The United States is therefore carrying on an unprecedented program to rearm itself and to assist other countries to rearm for these purposes. More than ever before, we are the arsenal of the free world. More immediately, we must continue to produce and deliver military supplies to the United Nations forces in Korea who have been fighting Soviet aggression for two years, and to the NATO Forces in Europe who must maintain a constant state of readiness against potential aggression.

Steel and defense.—In this context of military necessity, the President found that any interruption in the production of steel would endanger the security of the United States, its armed forces abroad, and its allies. The Nation's critical need for such continuous production is set forth in uncontradicted affidavits filed with the district court. In addition, we shall refer to certain information from reliable official sources. To a considerable extent, considerations of security require that the consequences of a cessation of steel production be described in only general terms.

Steel is the "basic commodity involved in the manufacture of substantially all weapons, munitions, and equipment produced in the United States" (R. 29). The Administrator of the Defense Production Administration states that "The total supply of steel normally available to the United States is substantially less than the esti-

mated requirements of defense and civilian production" (R. 33). The Administrator of the National Production Authority states that "In the month of February 1952, the total tonnage of iron and steel products shipped by the iron and steel industry for all uses was approximately 6,400,000 tons, of which it is estimated that 936,000 tons [or nearly 15%] were shipped for direct Department of Defense and Atomic Energy Commission uses" (R. 35).³⁵ A more accurate index of the defense needs for steel appears in a breakdown of particular types of steel. Thus, Secretary of Defense Lovett states that, "We are now using, for production of military end items (guns, tanks, planes, ships, ammunition and other military supplies and equipment), the following percentages of our total national steel production:

Carbon Steel.....	13.5 percent
Alloy Steel.....	36.6 percent
Stainless Steel.....	32.4 percent
Super alloy Steel.....	84.0 percent

(R. 29). To illustrate "the crisis which a steel shut-down would produce", Secretary Lovett stated that "35 percent of national production of one form of steel is going into ammunition for the use of our armed forces and 80 percent of such ammunition is going to Korea" (R. 30). Recognizing that even without a cessation of steel

³⁵ Preliminary figures for the month of March 1952 indicate that shipments of these products for all uses amounted to approximately 6,950,000 tons, of which it is estimated that 1,044,000 were shipped for direct use of the Department of Defense and the Atomic Energy Commission.

production there are shortages in certain types of steel, Secretary Lovett pointed out that "Another specific example of a critical shortage is in stainless steel. Fifteen percent of all stainless steel produced in the United States is used in the manufacture of airplane engines, including jets. No jet engine can be manufactured without substantial quantities of high-alloy steels" (R. 30). Secretary Lovett further states that "the fire power of an infantry division is 50 percent greater today than it was in World War II. We have substituted, insofar as possible, such fire power for man power. Our combat techniques are designed to employ the industrial strength of the United States by the increased use of matériel so as to preserve and protect to the maximum extent possible the lives of our men." From these facts, Secretary Lovett concludes that "A work stoppage in the steel industry will result immediately in serious curtailment of production of essential weapons and munitions of all kinds; if permitted to continue, it would weaken the defense effort in all critical areas and would imperil the safety of our fighting men and that of the Nation" (R. 31).

Shortly after the first atomic explosion in the Soviet Union in 1949, the President and Congress determined upon a tremendous expansion of the atomic weapons program. The Atomic Energy Commission was directed, among other things, to

proceed with work upon the hydrogen or fusion bomb. The Chairman of the Atomic Energy Commission states that "This expansion program includes the construction of major facilities at Savannah River, South Carolina; Paducah, Kentucky; Fernald, Ohio; and other places" (R. 31).

The scope of the Commission's expanded activities may be measured by the fact that during the fiscal years 1951 and 1952 Congress has appropriated \$3,638,000,000 for the Atomic Energy Commission.

The Chairman of the Atomic Energy Commission further states that (R. 32):-

The requirements of AEC's construction projects include virtually all types and kinds of steel including special forms of structural steel for buildings and substantial quantities of stainless steel for process equipment. These requirements include steel for structures and specially fabricated equipment and also for such items of specialized and standard manufacture as pumps, valves, compressors, heat exchangers, piping, heavy electrical equipment, tanks, and the like.

Inventories of steel and other critical products at the AEC construction projects are generally abnormally low for projects of such magnitude. Consequently, any cessation of deliveries of steel to the sites of AEC construction projects or to the manufacturers of equipment for such projects is

likely to result in delays in the completion of these projects. * * *

* * * * *

The ultimate effect of delayed completion of production facilities will inevitably be reflected in AEC's inability to step up the production of weapons to the rate required to meet the goals established by the President.

In the construction of AEC facilities, as in the manufacture of certain conventional military weapons, it is often necessary to use special alloys and shapes of steel, thus precluding either stockpiling or the utilization of miscellaneous steel inventories.

The Administrator of the National Production Authority points out that the immediacy of the impact of a cessation of production upon the production of weapons cannot be determined from aggregate steel inventories. The lack of a single alloy or shape of steel may completely stop the deliveries of an arms manufacturer who has material for every other part. This condition would be aggravated by the fact that there are already critical shortages of certain types of steel (R. 35-38).

The uncontradicted affidavits submitted by the Government reveal that a halt in steel production for any substantial period of time would have other far-reaching effects upon the military security of the Nation. Thus, the Congress and

the President have determined that American industrial capacity must be substantially increased to support the requirements of a global conflict—if one is forced upon us. This policy is evidenced in the provisions of Title III of the Defense Production Act for government encouragement of industrial expansion and in the statutory provisions for accelerated tax amortization of the cost of new productive facilities “necessary in the interest of national defense” (64 Stat. 939). The scope of this program may be gauged by the facts that as of February 29, 1952, the Government had guaranteed \$1.5 billion in private loans under Title III, while as of April 15 certificates for accelerated tax amortization had been issued for expansion projects totalling \$18.4 billion. The Administrator of the National Production Authority states that an interruption of steel production “would seriously impede certain construction programs required to support the mobilization effort including facilities for the production of aluminum, steel, certain essential chemicals, urgently needed metal-working equipment, particularly machine tools, and aircraft, ships, tanks, guns, shells and guided missiles. These construction projects will require a total of approximately 1,000,000 tons of steel for completion. All of these projects have a high degree of priority and any delay in completing

them would set back the production schedules of military products urgently needed in the mobilization effort." (R. 38.) It should be noted that there has been a substantial and urgent need for steel with which to increase steel making capacity, as indicated by the fact that certificates for accelerated tax amortization have been issued with respect to an expansion of steel production facilities to cost approximately \$3,200,000,000.

We have pointed out the effect of a cessation of steel production upon the military security of the United States. It would have identical effects upon the other countries which have joined with us to deter or repel Soviet aggression. For example, under the North Atlantic Treaty and the implementing legislation, the United States has entered into commitments with its allies to assist their rearmament programs. This assistance takes several forms—all involving large amounts of steel. Substantial amounts of military equipment have been and will be sent to those countries. During the 23 months ended February 29, 1952, the United States under the mutual aid program, delivered 2,577,200 tons of military equipment.³⁶ Also, the United States assists these west European countries to produce arms themselves by delivering to them both machine tools and certain types of steel. For exam-

³⁶ Hearings before the Senate Committee on Foreign Relations on a bill to amend the Mutual Security Act of 1951, 82d Cong., 2d Sess., p. 361.

ple, the United Kingdom has placed orders here for over \$100 million of machine tools, most of which are still in production. . Any stoppage in the delivery of steel to machine tool makers in the United States would have a heavy impact upon the British jet engine and tank production programs.³⁷ Similarly, during this past winter the United States agreed to allocate 1,000,000 tons of steel to the United Kingdom during 1952, in recognition of the fact that without such steel imports the United Kingdom would be forced to curtail its own military production.

To summarize the current relationship of steel production to the military and foreign affairs interests of the United States in the words of the President's Executive Order, "a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field." He acted to insure an uninterrupted flow of arms to United Nations forces who already have been repelling Soviet aggression in Korea and who must ever be prepared to deal with an all-out attack. He acted to insure the continuous build-up of American armed strength. He acted to insure the fulfillment of our commitments to assist our allies to

³⁷ For an example of the value of such tools to the British defense program, see *op. cit.* n. 36, p. 566.

resist aggression. Failure to act as he did might well have meant "too little, too late".

We have shown that uninterrupted production of steel is absolutely essential if the President is to insure the safety and efficiency of American troops in Korea and elsewhere and if he is to fulfill our commitments to our allies. He seized the steel mills to carry out those objectives. It is true that the President and other executive officers might possibly have insured continued production of steel otherwise than by seizing the steel mills. Specifically, if they had granted the substantial increase in maximum ceiling prices for steel which the plaintiffs were interested in securing, the plaintiffs and the union might have reached an agreement that would have prevented a strike. In his Message to the Congress on April 9, 1952, the President stated:

The only way that I know of, other than Government operation, by which a steel shut-down could have been avoided was to grant the demands of the steel industry for a large price increase. I believed and the officials in charge of our stabilization agencies believed that this would have wrecked our stabilization program. I was unwilling to accept the incalculable damage which might be done to our country by following such a course.

Accordingly, it was my judgment that Government operation of the steel mills

for a temporary period was the least undesirable of the courses of action which lay open. In the circumstances, I believed it to be, and now believe it to be, my duty and within my powers as President to follow that course of action.

The inflationary effects of huge defense expenditures upon our economy need no elaboration. To minimize and control them, Congress provided in Title IV of the Defense Production Act for price and wage controls and entrusted their administration to the President or his delegate. There is not presented in this case any question as to what price increase for steel, if any, would follow an increase in labor costs in the steel industry. The price standards under the Defense Production Act are not here in issue. Indeed, the administrative and judicial review procedures prescribed by the Act for challenging the validity or application of those price standards have not yet been invoked. All that is involved here is the fact that the President determined that to grant the substantial price increase desired by the plaintiffs would scuttle the Nation's stabilization program. Taking into consideration both his obligation to insure the military security of the United States and its armed forces by maintaining steel production, and his obligation to carry out the national stabilization policy expressed in the Defense Production Act, he determined that he could effectuate both of these basic national policies only by seizing and operating the steel mills.

Given conditions under which a cessation of steel production will endanger immediately the military security of the Nation, its armed forces and its allies, we believe the President's power under the Constitution to avert such danger by seizing and operating the steel mills is not lost merely because production might possibly have been maintained by acquiescing in price increases which in his judgment would endanger the national economy. Here, as in *Hirabayashi v. United States*, 320 U. S. 81, 93, such " * * * conditions call for the exercise of judgment and discretion and for the choice of means * * *" by the President in the exercise of his constitutional power and duty to meet national emergency.

I

THE DISTRICT COURT ERRED IN GRANTING A PRELIMINARY INJUNCTION

INTRODUCTORY

Judge Pine, in the district court, rested his decision on a determination that Executive Order 10340 was beyond the constitutional authority of the President. Reversing normal procedure, he held that the issue of constitutional power "should be decided first." (R. 68). Only after deciding that the President had exceeded his constitutional power did he consider whether the plaintiffs had made a showing entitling them to equitable relief.

(R. 74-75). And even then, he used his decision of the constitutional issues as a springboard from which to find a basis for equitable intervention,²⁸ concluding, upon his method of balancing the equities, that any injury to the public resulting from "the contemplated strike, with all its awful results, would be less injurious to the public than the injury which would flow from a timorous judicial recognition that there is some basis for this claim to unlimited and unrestrained power,"²⁹ which would be implicit in a failure to grant the injunction." (R. 75).

In his haste to decide constitutional issues, Judge Pine departed from long-established standards of adjudication by failing to apply the principle that the courts will not pass on constitutional

²⁸ Judge Pine stated (R. 74) :

As to the necessity for weighing the respective injuries and balancing the equities, I am not sure that this conventional requirement for the issuance of a preliminary injunction is applicable to a case where the Court comes to a fixed conclusion, as I do, that defendant's acts are illegal. On such premise, why are the plaintiffs to be deprived of their property and required to suffer further irreparable damage until answers to the complaints are filed and the cases are at issue and are reached for hearing on the merits. Nothing that could be submitted at such trial on the facts would alter the legal conclusion I have reached.

²⁹ We, of course, do not contend that the President has "unlimited and unrestrained" power. We contend only that in a situation of national emergency the President has authority under the Constitution, and subject to constitutional limitations, to take action of this type necessary to meet the emergency. See *infra*, pp. 91 et seq.

questions where the pending matter can be disposed of on non-constitutional grounds. "If two questions are raised, one of non-constitutional and the other of constitutional nature, and a decision of the non-constitutional question would make unnecessary a decision of the constitutional question, the former will be decided. The same rule should guide the lower court as well as this one." *Alma Motor Co. v. Timken Co.*, 329 U. S. 129, 136-137. This rule has particular application in passing upon requests for preliminary injunction. *Mayo v. Canning Co.*, 309 U. S. 310. Here the immediately dispositive non-constitutional issues were (1) whether the plaintiffs had an adequate remedy at law, and (2) whether, assuming they did not, they could demonstrate that they would suffer irreparable injury which would outweigh the uncontroverted injury to the public interest from the grant of an injunction.

The judicial policy of refraining from deciding constitutional issues "unless absolutely necessary to a decision of the case," *Burton v. United States*, 196 U. S. 283, 295, is a rule derived from "the unique place and character, in our scheme, of judicial review of governmental action for constitutionality". *Rescue Army v. Municipal Court*, 331 U. S. 549, 571. The foundations of the policy rest

in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional

roots; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our system. [ibid.]

The issues here touch, moreover, on one of the most delicate problems of our constitutional system—the basic implications of the doctrine of separation of powers. The President has disclaimed any intention to resist the process of the courts should it issue; he has publicly stated that he will abide by the decision of this Court, whatever that decision may be. N. Y. Times, May 2, 1952, p. 1. Nevertheless, we suggest that the courts should consider the inappropriateness of issuing what is in effect a mandatory injunction to the President.⁴⁰ At least, the diffi-

⁴⁰ This Court in *Mississippi v. Johnson*, 4 Wall, 475, 498, held unanimously that the President cannot “be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional.” Cf. *State ex rel. Burnquist v. District Court*, 141 Minn. 1; *Dakota Coal Co. v. Fraser*, 283 Fed. 415 (D. N. D.), vacated on appeal as moot, 267 Fed. 130 (C. A. 8); *Holzendorf v. Hay*, 20 App. D. C. 576, writ of error dismissed, 194 U. S. 373; see also *Trial of Thomas*

culties implicit in issuance of such a decree afford a sound reason for denying the injunction sought on other grounds, if it is possible to do so.

Accordingly, the district court, for considerations of policy "transcending specific procedures," *Rescue Army v. Municipal Court, supra*, 571, should have refrained from reaching the constitutional issues if there was any other basis on which it was possible to dispose of the case. Similarly, adherence to well-settled practice dictates that this Court can reach the constitutional issues in this case only if it concludes that the usual equity requirements for issuance of a preliminary injunction have been so clearly met,

Cooper, Wharton's State Trials of the United States, pp. 659, 662. With equal logic it could be argued that the President cannot be enjoined from taking action for which he claims authority in Article II of the Constitution. However, it has been contended, and the district court in this case so held, that Secretary Sawyer can be enjoined from carrying out the President's Executive Order. It is by no means clear that department heads can be enjoined from carrying out the President's express orders, by analogy to the fictitious distinction between suits against the United States and suits against an officer personally by which sovereign immunity from suit is minimized (*Larson v. Foreign and Domestic Corporation*, 337 U. S. 682), or by analogy to theories of indispensable parties evolved in the solution of venue problems (compare *Williams v. Fanning*, 332 U. S. 490, with *Blackmar v. Guerre*, 342 U. S. 512). Such theories cannot cope with the problem which would exist if the President personally performed the duties which he here directed Mr. Sawyer to perform. It would seem, therefore, that the issue is sufficiently uncertain and delicate as to constitute a compelling reason for leaving the plaintiffs to their legal remedy for damages.

that "Necessity compels it" to "undertake the most important and the most delicate of the Court's functions," *id.*, at 569.

We believe the usual equity requirements have not been met here, in two respects: *First*, the plaintiffs have an adequate remedy at law for any injury which they may suffer; and *second*, even if there were no such remedy at law, the plaintiffs have failed to show any such irreparable injury as would counterbalance the injury to the public from granting an injunction. Although we would be desirous of an immediate decision on the constitutional issues, we feel that deference to the settled practice of this Court in constitutional adjudications requires that we discuss first these non-constitutional grounds of decision, either of which, we think, requires reversal of the judgment below.

A. PLAINTIFFS HAVE AN ADEQUATE REMEDY AT LAW

Under the fundamental rules governing equitable jurisdiction, plaintiffs are entitled to injunctive relief only if they can show either that legal relief is not available to them or that such legal remedy, although available, would be inadequate. See, e. g., *Coffman v. Breeze Corporations*, 323 U. S. 316, 323. We believe that plaintiffs' recourse to injunctive relief is barred because they have an effective remedy in the Court of Claims pursuant

to 28 U. S. C. 1491.⁴¹ It has, of course, been settled in a long line of cases, beginning with *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, that where the United States takes property for public use a right to compensation is enforceable in the Court of Claims, either directly under the Constitution or by virtue of an implied contract. 28 U. S. C. 1491 (1), (4).⁴²

Plaintiffs' argument is that this remedy is not available to them unless Secretary Sawyer's acts are supported by statutory or constitutional authority; hence, that the preliminary question whether plaintiffs have an adequate remedy at

⁴¹ Section 1491 provides:

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:

- (1) Founded upon the Constitution; or
- (2) Founded upon any Act of Congress; or
- (3) Founded upon any regulation of an executive department; or
- (4) Founded upon any express or implied contract with the United States; or
- (5) For liquidated or unliquidated damages in cases not sounding in tort."

⁴² See, e. g., *United States v. Great Falls Mfg. Co.*, 112 U. S. 645; *United States v. Lynah*, 188 U. S. 445, 465; *Tempel v. United States*, 248 U. S. 121; *United States v. North American Transp. & Trading Co.*, 253 U. S. 330; *Campbell v. United States*, 266 U. S. 368; *Phelps v. United States*, 274 U. S. 341; *International Paper Co. v. United States*, 282 U. S. 399; *Hurley v. Kincaid*, 285 U. S. 95; *Yearsley v. W. A. Ross Construction Co.*, 309 U. S. 18; *United States v. Causby*, 328 U. S. 256; *United States v. Dickinson*, 331 U. S. 745; *United States v. Kansas City Ins. Co.*, 339 U. S. 799.

law hinges on the very merits of the case. We submit, on the contrary, that plaintiffs have a remedy in the Court of Claims, and that therefore the Court need not reach any of the constitutional questions in order to decide that an injunction may not issue.

In such a practical matter as the granting or withholding of an injunction, the formal concession of government counsel, repeated in three courts, that suit may be brought and that no defense of lack of jurisdiction can or will be raised, should be sufficient. See *Pewee Coal Co. v. United States*, 115 C. Cls. 626, affirmed, 341 U. S. 114. But even on the theoretical level, plaintiffs need have no fears. For, however one may formulate the rule that unauthorized takings cannot provide the basis for a Tucker Act suit, the qualification has always been recognized that the Court of Claims does have undoubted cognizance of cases, such as this, where a taking of the claimant's property is authorized by statute, although the particular method of taking actually employed by the government official may be claimed to be illegal. In addition, it may now be the law that the Court of Claims has jurisdiction of suits for just compensation for eminent domain takings without regard to whether a taking was legislatively authorized.

1. Even if we accept at face value the doctrine, asserted by plaintiffs, that the Court of Claims remedy depends strictly upon an authorized tak-

ing, it is clear that statutory warrant does exist for a taking by the President and, therefore, that plaintiffs have an indisputable cause of action in that court. Rather than alleging a total absence of any authority in the President to seize the plants, the companies themselves suggest that there are statutes under which the plants could have been seized, but that, since the procedure provided for in those acts has not been followed, they are now entitled to affirmative relief. It is settled, however, that where a taking has been authorized, the use of another method of seizure and the failure to employ the statutory procedure will neither defeat the remedy in the Court of Claims nor justify the issuance of injunctive relief.

The Youngstown and United States Steel complaints both refer to Section 18 of the Selective Service Act of 1948 (62 Stat. 625, 50 U. S. C. App., Supp. IV, 468) (par. 6, R. 2, and par. 12, R. 83, respectively), authorizing the President to place vital defense orders with a manufacturer and to seize his plant if he refuses or fails to fill the order. The United States Steel complaint. (par. 12, R. 83) also refers to Section 201 of the Defense Production Act of 1950 as amended (64 Stat. 799, 65 Stat. 132, 50 U. S. C. A. App. 2081), which authorizes the President, whenever he deems it necessary in the interest of national defense, to acquire personal property by requisition and "real property, including facilities, tempo-

rary use thereof, or other interest therein" by way of condemnation. The statute provides that if the property is to be acquired by condemnation the court shall not require the party in possession to surrender possession, unless a declaration of taking has been filed and the amount estimated to be just compensation has been deposited."

The complaints correctly allege that the Government has not complied with the procedural requirements of either statute, but it is undeniable that the President acted for the same public purpose for which the two Acts envisage that private enterprises might have to be taken. Section 201, for instance, authorizes the President to acquire property whenever he deems it necessary in the interest of national defense. Execu-

⁴³ This provision is analogous to the one contained in the Declaration of Taking Act (Act of Feb. 26, 1931, 46 Stat. 1421, 40 U. S. C. 258a).

As originally enacted, the Defense Production Act of 1950 (P. L. No. 774; 81st Cong., 2d Sess.) assimilated real to personal property and provided that both should be compulsorily acquired by the process of requisition, *i. e.*, by an administrative taking to be followed by a suit for just compensation brought by the claimant. For reasons of convenience and efficiency, and in order to follow the traditional practice in the condemnation of realty, the Department of Justice proposed an amendment providing that real property be condemned in accordance with the Declaration of Taking Act and the general condemnation statutes. This change was adopted in the Defense Production Act Amendments of 1951 (P. L. No. 96, 82d Cong., 1st Sess.). The amendment was plainly not intended to hamper or obstruct the acquisition of interests in real property. See H. Rept. No. 639, 82d Cong., 1st Sess., pp. 23-24, 36.

tive Order 10340 (R. 6-9) contains findings to the effect that a work stoppage would immediately jeopardize and imperil our national defense and that seizure of the steel industry was necessary in order to assure the continued availability of steel and steel products during the present emergency. Hence, conditions existed which would have warranted use of Section 201 (b) if that procedure had not been much too cumbersome, involved, and time-consuming for the crisis which was at hand.

Thus, the President had undoubted statutory power to seize the plaintiffs' properties for temporary use. Congress had itself authorized a taking by the President, even if it had not provided for this kind or method of taking.

Once it is shown that the seizing officer had such general authority to take, the Court of Claims' just compensation jurisdiction is undeniable, whether or not the statutory procedures were followed. The most common instance is furnished by the Tucker Act flooding cases. In each, instead of bringing an ordinary condemnation suit under the Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. 257, a statutory authority similar to Section 201, the government officers proceeded with their rivers and harbors works until the owners' lands were flooded and thereby taken. The owners have repeatedly sued and received just compensation in the Court of Claims for the taking. See the cases cited in fn. 42, *supra*, p. 55.

They have not been defeated by any contention that condemnation proceedings should have been followed. On the contrary, the Court held in *Jacobs v. United States*, 290 U. S. 13, 16:

The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States.

And the Court only recently reaffirmed the interchangeability of the two proceedings in flooding cases. *United States v. Dickinson*, 331 U. S. 745, 747-748. The same interchangeability exists where dry land is taken. See, e. g., *United States v. North American Transp. & Trading Co.*, 253 U. S. 330, 333; *Stubbs v. United States*, 21 F. Supp. 1007 (M. D. N. C.); *Tilden v. United States*, 10 F. Supp. 377 (W. D. La.). In all of these numerous instances, a statutory method of condemnation was provided, and in many, the

authorizing statute provide~~d~~ that the land be acquired by condemnation proceedings; but instead of using that mechanism the officials appropriated the property by direct invasion. In each case, a suit for just compensation under the Tucker Act was entertained.

Further examples of Tucker Act jurisdiction on the basis of informal eminent domain are the cases in which a normal condemnation suit has been instituted and possession taken, but the suit has later been abandoned by the Government or held not to include certain tracts. The dispossessed owners have their remedy in the Court of Claims or in the District Court under the Tucker Act. *State Road Department of Florida v. United States*, 166 F. 2d 843 (C. A. 5); *Moody v. Wickard*, 136 F. 2d 801, 803-804 (C. A. D. C.), certiorari denied, 320 U. S. 775; cf. *United States v. Merchants Transfer & Storage Co.*, 144 F. 2d 324, 327 (C. A. 9). And this Court has emphatically declared that after a taking has been consummated, the right to recover compensation cannot be defeated because of a technical defect in the authority of the official who took the property. See *International Paper Co. v. United States*, 282 U. S. 399, 406, *infra*, p. 71.

Applying these principles and directly controlling is *Hurley v. Kincaid*, 285 U. S. 95, in which the Court refused to grant an injunction in circumstances apposite here. Kincaid sought to enjoin Secretary of War Hurley from con-

structing certain flood control work on the Mississippi River which would subject Kincaid's property to flooding, unless the Government first acquired an easement on his property by condemnation. The applicable statutes,⁴⁴ analogous to Section 201 (b) of the Defense Production Act, provided that before the United States acquired possession it had to file a condemnation petition in court and deposit an amount of money approved by the court as assuring certain and adequate provision for the payment of just compensation. The Government had complied with none of those provisions. Instead, the officers of the Corps of Engineers were about to undertake construction which, Kincaid claimed, would result in the flooding of his land. He sought to stop the work until the officers complied with the applicable condemnation procedure.⁴⁵

The Court held flatly that Kincaid was not entitled to an injunction. It pointed out (at p. 104) that a taking was authorized by the statutes cited above and that the plaintiff, consequently, had a remedy in the Court of Claims.

⁴⁴ The Mississippi River Flood Control Act of May 15, 1928, sec. 4, 45 Stat. 536, and the River and Harbor Act of 1918, sec. 5, 40 Stat. 911.

⁴⁵ Kincaid's brief in this Court urged, as the plaintiffs do here, that the statutory procedure for condemnation was exclusive and had to be followed if a taking was to be effected. See Brief for Respondent, No. 457, Oct. Term, 1931, at pp. 59, 72.

The failure to comply with the statutory direction to condemn prior to the taking did not justify the issuance of injunctive relief. Said the Court (at p. 104):

The compensation which he may obtain in such a proceeding [under the Tucker Act] will be the same as that which might have been awarded had the defendants instituted the condemnation proceedings which it is contended the statute requires. Nor is it material to inquire now whether the statute does so require. For even if the defendants are acting illegally, under the Act, in threatening to proceed without first acquiring flowage rights over the complainant's lands, the illegality, on complainant's own contention, is confined to the failure to compensate him for the taking, and affords no basis for an injunction if such compensation may be procured in an action at law. The Fifth Amendment does not entitle him to be paid in advance of the taking [citing authorities].

In short, the test for the grant of injunctive relief is not whether or not the government has complied with the statutory taking procedure,⁴⁰ but whether the plaintiff has a remedy in the

⁴⁰ An analogous rule applies in the field of damages. The owner of property, which has not been condemned, has no remedy in damages against a government contractor provided he has recourse to the Court of Claims. *Yearsley v. Ross Construction Co.*, 309 U. S. 18.

Court of Claims. Such a remedy is available whenever a taking is authorized by legislation.⁴⁷

2. It may also be the case that, aside from the *Hurley v. Kincaid* principle we have just discussed, the Court of Claims would have jurisdiction of a just compensation suit by the plaintiffs even though no statute existed, authorizing the President to take property. It is true that it has often been said or assumed that an action against the United States for just compensation presupposes that the officers who invaded the plaintiff's property rights had authority to do so. But the reach and application of this rule in Tucker Act suits have not been crystallized and the tendency of the recent cases, particularly in the Court of Claims, is to disregard the issue of authority in favor of assuming jurisdiction wherever there has been an actual physical taking and where the Constitution directs that compensation be paid.

(a). The two basic Tucker Act decisions which ground the asserted rule are themselves unclear. *Hooe v. United States*, 218 U. S. 322, involved an express limitation upon the officer's authority (see *Larson v. Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 701, fn. 24),⁴⁸ a factor which is usually absent and is certainly not present

⁴⁷ Cf. *Larson v. Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 697, fn. 18.

⁴⁸ Cf. *United States v. Lynah*, 188 U. S. 445, 465-6:

That which the officers did is admitted by the answer

here. The precedential value on this point of *United States v. North American Co.*, 253 U. S. 330, is lessened by the circumstance that it rested on "special facts" (cf. *Jacobs v. United States*, 290 U. S. 13, 18, and *Shoshone Tribe v. United States*, 299 U. S. 476, 497), including the element that North American's claim would have been barred by the statute of limitations if the officer who originally took the property had been authorized to do so.

A number of recent lower court Tucker Act cases seem to make the right to sue for just compensation dependent not upon the taking officer's authority but upon the consideration that where the Government retains the benefit of seized property the owner may seek compensation without showing that the seizure was valid. In *Oro Fino Consolidated Mines, Inc. v. United States*, 118 C. Cls. 18, 23, certiorari denied, 341 U. S. 948, the Court of Claims stated "that the Government cannot escape liability by pleading that it lacked authority to take what it did in fact take and retain. * * * If Order L-208 resulted in an unauthorized taking, it was a taking of which the

to have been done by authority of the government, and although there may have been no specific act of Congress directing the appropriation of this property of the plaintiffs, yet if that which the officers of the government did, acting under its direction, resulted in an appropriation it is to be treated as the act of the government. [Emphasis supplied.]

Government retained the benefit and for which it would therefore be obligated to pay". In *Foster v. United States*, 98 F. Supp. 349, 351-2 (C. Cls.), certiorari denied, 342 U. S. 919, the same court strongly intimated that an action for just compensation would lie in every case in which a person's property is kept from him by the United States for its own use. Only the other day, the court declared that in cases where a regulation or statute is unconstitutional as violative of due process, just compensation may still be decreed "if an actual taking [has] been alleged, proved, and loss established * * *." *Idaho Maryland Mines Corp. v. United States*, C. Cls. No. 50182, decided May 6, 1952, slip op. p. 10." See also, for cases disregarding or omitting consideration of the taker's authority but nevertheless awarding just compensation, *Forest of Dean Iron Ore Co. v. United States*, 106 C. Cls. 250, 265-7; *Niagara Falls Bridge Commission v. United States*, 111 C. Cls. 338, 352-3; *Cotton Land Co. v. United States*, 109 C. Cls. 810, 830-832; *International Harvester Co. v. United States*, 72 C. Cls. 707; *Thayer v. United States*, 20 C. Cls. 137.

The lessened stress which appears to be placed on the issue of authority, and the heightened con-

* The court also said (slip op., p. 10):

"A regulation which is unconstitutional as violative of due process, because arbitrary, may well result in a taking of the property effected for which just compensation would be due to the extent of the value of the property rights so taken."

cern with providing a Court of Claims remedy for a taking, is also revealed in recent decisions of this Court. *United States v. Causby*, 328 U. S. 256, involved the taking of an easement over property adjoining an airfield by frequent flights at low altitude. This Court held the owner of the land entitled to compensation without discussing the authority of the military to make such low flights or to appropriate the easement. This disposition of the case is in marked contrast with the decision in *Portsmouth Co. v. United States*, 260 U. S. 327, which involved the analogous situation of artillery fire over private property. There, the Court expressly indicated that the plaintiff could recover only if it established "authority on the part of those who did the acts" (at 330). Again, in *United States v. Pewee Coal Co.*, 341 U. S. 114, this issue which, if material, would be of a jurisdictional nature (see *Hooe v. United States*, 218 U. S. 322, 336) was not explicitly passed upon by the Court. It is true that in *Pewee* the Government had not defended on the ground that the taking was unauthorized (cf. *Pewee Coal Co. v. United States*, 115 C. Cls. 626, 676), but the Government's brief before this Court disclosed that the seizure had not been based on any specific statutory authority,⁵⁰ and jurisdictional issues may be noticed on a court's own motion (*United*

⁵⁰ See Government's Brief in No. 168, October Term, 1950, pp. 42-44.

States v. Corrick, 298 U. S. 435, 440; *United States v. Wheelock Bros., Inc.*, 341 U. S. 319).⁵¹

Another facet of the same concern with providing, rather than denying, a just compensation remedy is shown by *Cities Service Co. v. McGrath*, 342 U. S. 330, 335-6 (affirming 189 F. 2d 744, 747 (C. A. 2)), and *Silesian-American Corp. v. Clark*, 332 U. S. 459, 479-480 (affirming 156 F. 2d 793, 797 (C. A. 2)), both of which construed the Tucker Act as available to persons from whom property was taken under the Trading with the Enemy Act but whose remedy under that Act was deemed too narrow. See also *Sherr v. Anaconda Wire & Cable Co.*, 149 F. 2d 680, 681-2 (if statute cutting off informer's right of action deprived him of "vested right", suit for just compensation was available in the Court of Claims); *Larson v. Domestic & Foreign Corp.*, 337 U. S. 682, 697, fn. 18 ("Where the action against which specific relief is sought is a taking or holding of the plaintiffs' property, the availability of a suit for compensation against the sovereign [in the Court of Claims] will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment"); *Yearsley v. Ross Construction Co.*, 309 U. S. 18, 21-22 (Tucker Act remedy available instead of suit against Government rep-

⁵¹As we point out below (pp. 140-141), the *Pewee* decision may also be read as holding that a taking like this one is valid and authorized.

representatives alleged to have taken the plaintiff's property); *Fay v. Miller*, 183 F. 2d 986, 989 (C. A. D. C.)

(b)./ Whatever may be the ultimate general principle distilled from these latter-day developments in the jurisprudence of the Tucker Act, we suggest that in this case the broad doctrine which plaintiffs proclaim should not be applied. Perhaps the most important reason for insisting that an unauthorized taking cannot subject the United States to liability is to prevent executive officials from violating *express* prohibitions imposed by Congress. See *Hoe v. United States*, 218 U. S. 322, *supra*, p. 64. A second purpose is, perhaps, to forestall minor officials from seizing property unnecessarily or for personal reasons or through collusion.

Neither of these ends is served by requiring the President's authority in this case to be fully vindicated before suit can be properly maintained under the Tucker Act. Congress has not prohibited the President from doing what he has done here. And it is the President himself, acting in a grave national emergency and for the most public of purposes, who has seized the plaintiffs' plants, not a minor subordinate acting on his own.

28 U. S. C. 1491 (fn. 41, *supra*, p. 55) may be said to recognize this distinction between executive action founded on a formal order or regulation and independent action taken by subordi-

nates. That section gives the Court of Claims jurisdiction over claims "founded upon any regulation of an executive department" [Sec. 1491 (3)], and it does not add that the regulation must be valid or authorized. Here, the Executive Order would be the basis of the plaintiffs' claim, and since it orders a taking and contemplates just compensation, the Court of Claims would appear to have full jurisdiction under 28 U. S. C. 1491 (3), regardless of the constitutional validity of the President's taking.⁵²

3. A further word should also be said as to the practical probabilities of plaintiffs' not having a remedy in the Court of Claims. Government counsel have assured them and the courts that, if an injunction is not issued, no objection will be raised to the Court of Claims' jurisdiction on the ground that the taking was invalid. The *Pewee* case shows that this is not an idle promise, but established Government policy. It is certainly not to the plaintiffs' interest to raise the point of validity in the Court of Claims. Their sole fear is that future Government counsel will make such a defense or that present counsel will change their position. But if that should happen, the

⁵² Conversely, the Tort Claims Act (28 U. S. C. 2680 (a)) exempts from the coverage of that statute a claim "based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid * * *"

courts have a ready answer in the pungent words of Mr. Justice Holmes in *International Paper Co. v. United States*, 282 U. S. 399, 406:

The Government has urged different defenses with varying energy at different stages of the case. The latest to be pressed is that it does not appear that the action of the Secretary was authorized by Congress. We shall give scant consideration to such a repudiation of responsibility. The Secretary of War in the name of the President, with the power of the country behind him, in critical time of war, requisitioned what was needed and got it. Nobody doubts, we presume, that if any technical defect of authority had been pointed out it would have been remedied at once. The Government exercised its power in the interest of the country in an important matter, without difficulty, so far as appears, until the time comes to pay for what it has had. The doubt is rather late. We shall accept as sufficient answer the reference of the petitioner to the National Defense Act of June 3, 1916, c. 134, § 120, 39 Stat. 166, 213; U. S. Code, Title 50, § 80, giving the President in time of war power to place an obligatory order with any corporation for such product as may be required, which is of the kind usually produced by such corporation.

(See also *United States v. Georgia Marble Co.*, 106 F. 2d 955, 957 (C. A. 5)). We do not believe that either the Court of Claims or this Court will

have greater difficulty with the future "repudiation of responsibility" which plaintiffs say they fear.

4. The legal remedy which plaintiffs have in the Court of Claims is plainly adequate. There is a short answer to the possible argument that damages in the Court of Claims are an inadequate remedy in view of the uniqueness of the interests taken, the difficulties of assessing damages, and the circumstance that some injuries are incapable of monetary compensation. Plaintiffs' remedy in the Court of Claims is the same as under an award in eminent domain proceedings (*Hurley v. Kincaid*, 285 U. S. 95, 104; *Jacobs v. United States*, 290 U. S. 13, 16). And it is one of the inherent liabilities of private property that it is always subject to the exercise of the paramount right of eminent domain (*United States v. Lynah*, 188 U. S. 445, 465), and that the owner is merely entitled to such monetary compensation as will indemnify him fairly and justly. *Monongahela Navigation Co. v. United States*, 148 U. S. 312; *Seaboard Airline Ry. v. United States*, 261 U. S. 299, 306; *Jacobs v. United States*, 290 U. S. 13, 16-17.

Such monetary compensation will clearly be adequate in the present case. The asserted damage which plaintiffs principally allege consists in a trespass or taking, an interference with plaintiff's right to bargain collectively with their employees, and a fear that defendant will impose

some or all of the recommendations of the Wage Stabilization Board.⁵³ These are usual consequences of the type of taking here involved, for which the remedy of a suit for just compensation has been held adequate. For such a taking to accomplish its purpose necessarily means that the United States "has substituted itself for the private employer in dealing with those matters which formerly were the subject of collective bargaining with the operators." *United States v. Mine Workers*, 330 U. S. 258, 287. Thus, in *United States v. Pewee Coal Co.*, 341 U. S. 114, 118, this Court sustained an award of monetary damages in respect of a wage increase ordered by the Government during the seizure.⁵⁴ See also

⁵³ Other allegations include asserted interference with the right of management, disruption of customer relations, disclosure of trade secrets, damage to plant and facilities by defendant's agents. See *Armco* complaint, par. 17, R. 148-152; *Jones & Laughlin* complaint, par. 16, R. 138-139; *Youngstown* complaint, par. 14, R. 3; *Bethlehem* complaint, par. 14, R. 120-121; *Republic* complaint, par. 12, R. 157-158; *U. S. Steel* complaint, par. 15, R. 84-86; *E. J. Lavino* complaint, par. 38, R. 176-177. These are wholly speculative, if not imaginary. Paragraphs 4 and 5 of Executive Order 10341, Secretary Sawyer's Order No. 1 and his telegraphic notice of taking (R. 8, 21, 22) make it plain that the seizure involves no interference with management, the ordinary course of business, or the financial functioning of the seized plants.

⁵⁴ That any damages which plaintiffs might suffer as a result of changes in wages or working conditions are measurable and compensable in monetary terms is shown by the *Stephens* affidavit (R. 99-111), which places a monetary value on each of the recommendations. Pars. 12-18, R. 106-108.

Plaintiffs may assert that the "union shop" is in a different

Wheelock Bros., Inc. v. United States, 115 C. Cls. 733, 88 F. Supp. 278.

We think it very doubtful that any real injury will occur to plaintiffs. Cf. *Marion & Rye Valley Railway v. United States*, 270 U. S. 280. See *infra*, pp. 75-85. But if any should occur, it would clearly be of the type which can be compensated by suit at law under 28 U. S. C. 1491. *United States v. Pewee Coal Co., supra.*⁸⁸

category. It is difficult to see how the question of the union shop, vital as it is to employees, is of legally recognizable concern to the plaintiffs. Thus the Jones & Laughlin complaint states that the company "cannot, with proper regard for its own convictions concerning principles of Government, agree to the recommendation of a 'union shop'" (R. 136). This hardly states a recognizable interest, cognizable either at law or in equity. The companies have no vicarious standing here on behalf of their employees. And the companies are not eleemosynary corporations or educational foundations with a legally recognizable right to support general principles of government or tenets of political philosophy. In any event, the fact that in a statutory seizure the same result could occur, and would, if it occurred, be compensable only in monetary terms, affords a complete answer to their contention.

⁸⁸ The district court's bare statement that "The records show that monetary recovery would be inadequate" (R. 75), unsupported by reasoning or reference to any evidence, does not stand in the way of this conclusion. In any event, since the case was heard on pleadings and affidavits, this Court is in as good a position as the district court to determine the adequacy of monetary recovery.

B. PLAINTIFFS HAVE MADE NO SHOWING OF INJURY SUFFICIENT TO COUNTERBALANCE THE INJURY TO THE PUBLIC INTEREST WHICH WOULD FLOW FROM THE GRANTING OF AN INJUNCTION

Apart from the availability of an adequate remedy at law, plaintiffs have failed to establish a threat of such irreparable injury to themselves as could outweigh the evident irreparable injury to the public interest which would flow from the granting of an injunction. Plaintiffs' obligation in this respect is twofold. They must first make a clear showing of irreparable injury and, second, any such injury must be balanced against the injury to the public. These requirements are applicable to the grant of preliminary and permanent injunctions alike. Notwithstanding the fact that the present case comes up on review of a preliminary injunction, we believe that, on the face of their complaints and affidavits, plaintiffs' showing is so deficient that this Court would be warranted in ordering their actions dismissed forthwith. Alternatively, if this Court deems further proceedings in the district court necessary, we submit that no preliminary injunction should issue.

1. *Plaintiffs have made no showing of irreparable injury.*—The burden on plaintiffs is a heavy one. As this Court said, in a case denying injunctive relief against a taking for which a remedy of just compensation was available:

Even where the remedy at law is less clear and adequate, where large public in-

terests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon clear showing that its intervention is necessary in order to prevent an irreparable injury. [*Hurley v. Kincaid*, 285 U. S. 95, 104n.]

Plaintiffs have made no such clear showing. Their general allegations as to interference with their power of management, etc., by the seizure are, on the facts alleged and on every reasonable probability, speculative in the extreme. See n. 53, p. 73, *supra*. And compare *Marion & Rye Valley Ry. v. United States*, 270 U. S. 280, 282, holding in respect of a similar seizure that "nothing of value was taken from the company".⁵⁶ The gravamen of their complaints is that the defendant threatens to impose new wages and conditions of employment. But the assertion that such threatened action exposes them to irreparable injury disregards several highly pertinent considerations.

a. Plaintiffs ignore the fact that the *status quo* which existed at the time the President acted was that the union had called a strike and workers had started to leave the plants. The President's action thus conferred a great benefit on plaintiffs, by averting a strike which would have caused

⁵⁶ See also *Pewee Coal Co. v. United States*, 115 C. Cls. 626, 671, 678, 88 F. Supp. 426, 427, 430-431.

them enormous damages. Plaintiffs' position apparently is that they may ignore the benefit conferred upon them by the President's action while obtaining relief in respect of any damages assertedly flowing from that action. A comparable position was rejected in *United States v. Sponenbarger*, 308 U. S. 256.⁵⁷ Undoubtedly, the plaintiffs would like to have it both ways. They would like to have the benefits of a guaranty against strikes without having to pay any price, in terms of increased wages and changes in working conditions, for the achievement of those benefits.⁵⁸ But we do not see how, in good conscience, they can do so.

⁵⁷ "The constitutional prohibition against uncompensated taking of private property for public use is grounded upon a conception of the injustice in favoring the public as against an individual property owner. But if governmental activities inflict slight damage upon land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would be to grant him a special bounty." [308 U. S. at 266-267.]

As indicated below (pp. 81 ff.), we do not believe that the proposed imposition of different wages and working conditions would result in recognizable legal injury. Even if it could be said, however, that that injury was recognizable and substantial, the principle of the *Sponenbarger* case would seem to require that any such injury must be measured against the benefit conferred by the governmental action.

⁵⁸ This is clearly reflected in the "oral amendment" to United States Steel Corporation's prayer for an injunction, by which it suggested that the seizure be left undisturbed but that the defendant be enjoined from making any change in wages or working conditions. (R. 76, 311, 313.) Such an order would, of course, have left the plaintiffs in an enviable situation under which they would have continued to operate their mills with a minimum of interference from the United States, with an assurance of no strike for the

The plaintiffs' allegations here are of the same sort which were made in *United States v. Pewee Coal Co.*, 341 U. S. 114. There, the dissenting judge in the Court of Claims, whose opinion was adopted in this respect by four judges of this Court, concluded, as to a precisely comparable seizure by executive authority followed by an imposition of changed working conditions which allegedly resulted in an increased cost to the company, that:

The court has not found that the plaintiff [company] could have operated its mine without making the concessions directed by the War Labor Board, nor has it found what the losses to the plaintiff would have been if the Government had not intervened and the strike had continued. I think that the court is not justified in awarding the plaintiff the amount of these expenditures when it does not and, I think, could not, find that the plaintiff was, in fact, financially harmed by the Government's acts. [88 F. Supp. at 431, quoted in 341 U. S. at 122]

indefinite future, and with no pressure whatever on them to grant any concessions in an attempt to resolve the underlying labor dispute. We suggest that it is not unfair to assume that this is the relief which all of the plaintiffs really desired, and that the other plaintiffs refrained from joining in the oral amendment made by the United States Steel only because they recognized the impossibility of contending in equity for such a one-sided result.

Mr. Justice Reed, as we read his opinion, failed to go along with this conclusion only because he felt that the finding of the majority of the Court of Claims "that a certain sum was expended without legal or business necessity so to do," 341 U. S. at 121, could not be attacked, the Government having failed to bring up the entire record. And the other four judges in that case rested their approval of the award of damages in large part on the finding that the plant had operated at a loss during the period of Government possession; whereas here, for reasons which we shall develop, there is no reasonable possibility of operation at a loss.

b. Plaintiffs' asserted injuries from the granting of a wage-increase and other changes in conditions of employment are grossly overstated. They ignore, for example, the fact that some increase in wages and change in working conditions was almost inevitable. This was the first occasion since 1947 for thorough review and revision of the collective bargaining agreement. (p. 7, n. 3, *supra*). Moreover, the fact that the Wage Stabilization Board had recommended substantial changes, which it described as in the nature of a "catch-up", designed to equate the position of steel workers with workers in comparable industries, made it practically certain that the union would never enter into an agreement calling for no change. Indeed, the steel companies had indicated their willingness to agree to a "pack-

age" deal of more than 20¢ per hour, an offer which included all of the Board's recommendations intended to be presently effective. (Testimony of John A. Stephens before Senate Committee on Labor and Public Welfare, April 22, 1952, stenographic transcript, volume 3, p. 274; R. 361).⁵⁹

c. Finally, plaintiffs ignore the effect of any price increase which might be allowed. That such

⁶⁰ Stephens, a vice-president of U. S. Steel, signed the principal affidavit submitted by U. S. Steel in support of its application for a preliminary injunction (R. 99). Stephens' affidavit, the most detailed and specific submitted by any of the plaintiffs, substantially overstated their damages in several other respects. Thus, it assumes that Mr. Sawyer would order adoption of the Wage Stabilization Board's recommendations in full, although there is no present indication of any such proposal, and it argues (pars. 19-20) that the company's total costs would increase by twice the amount of any rise in employment costs, despite the absence of any showing—other than a process of reasoning *post* (or even *prior*) *hoc ergo propter hoc*—that there is any causal relationship between an increase in the wages a steel company pays and the cost of other things it must buy (see Statement of Ellis Arnall, Director of Price Stabilization, before Senate Committee on Labor and Public Welfare, April 16, 1952, Sen. Doc. No. 118, 82d Cong., 2d Sess., p. 6).

As for the asserted damage alleged to follow from possible imposition of the union shop, see fn. 54, *supra*, p. 73. In this connection, the actual position taken by the Board on the union security issue should be noted. The Board recommended that the parties determine which of a variety of forms would be adopted. Under a system such as the Rand formula, union security would simply eliminate the "free ride" now enjoyed by nonunion employees. Report and Recommendations of the Wage Stabilization Board, March 20, 1952, pp. 16 ff.

a price increase would compensate, in part or in whole, for any wage increase was clearly recognized in the complaints of United States Steel Co. (par. 15 (c), R. 85) and Armco Steel Co. (Par. 17 (c), R. 149). Both of these complaints, after referring to the threatened wage increases, allege, in identical language:

These products are subject to price regulations imposed by the United States and the governmental agency regulating such prices has failed and refuses to permit increases in the prices of such products so as to enable plaintiff to attempt to recoup such increased costs.

Indeed, the steel companies have made it clear that they might not object to the proposed wage increases, if price increases, deemed by them adequate to compensate for the wage increases, were also granted. (Panel Report in Steel Wage Case, March 13, 1952, p. 2; Statement on Steel by Ellis Arnall; Senate Committee on Labor and Public Welfare, S. Doc. 118, 82d Cong., 2d Sess., *passim*.)

We do not mean to suggest that substantial price increases will or should be granted.¹⁰⁰ But the fact that plaintiffs have thus tied together the issues of wage increases and price increases indicates, we believe, that their real complaint is with the denial of a price increase.

¹⁰⁰ An increase under the Capehart amendment (estimated at \$3 per ton) has been definitely offered. Statement of Ellis Arnall, *supra*, p. 2. Such an increase would, of course, materially diminish any damages suffered through an increase in labor costs.

What plaintiffs are claiming, accordingly, is a right to profits greater than those permitted by the present price stabilization program. Section 402 (b) (2) of the Defense Production Act requires that price ceilings be "generally fair and equitable." To carry out this direction, the Office of Price Stabilization, with the approval of the Economic Stabilization Administrator, has adopted the "Industry Earnings Standard."⁶¹ That standard requires OPS to raise prices for industry if and when its return on investment, before taxes, falls below 85 per cent of the level enjoyed in the best three of the four years 1946 through 1949.⁶² In the event that, as a result of any wage increase that might be directed, profits for the industry should fall below this figure, the plaintiffs would have ample opportunity to apply to the Office of Price Stabilization for an appropriate price increase. The decision of the Office of Price Stabilization would be entered in accordance with the requirements of due process, and

⁶¹ Statement of Ellis Arnall, *supra*, p. 80. See Press Release, OPS, dated February 19, 1952, "Re: Application of OPS Industry Earnings Standard", particularly Price Operations Memorandum No. 25, Subject: "Industry Earnings Standard".

⁶² The steel industry cannot complain of the use of this level; the years 1947-1949 were the most profitable which the steel industry has experienced since World War I. See Statement on Steel by Ellis Arnall, Director of Price Stabilization, before the Senate Committee on Labor and Public Welfare, April 16, 1952, Senate Document 118, 82d Cong., 2d Sess., p. 3.

would be subject to appropriate judicial review.⁶³

On its face, therefore, plaintiffs' contention that they will be subjected to increased costs which cannot otherwise be compensated comes to a contention that plaintiffs have a constitutionally protected and judicially recognizable right to profits greater than those permitted under the Defense Production Act. This contention cannot be sustained. The constitutional validity of a system of price control during a time of emergency is no longer subject to doubt. *Yakus v. United States*, 321 U. S. 414. Nor do we think it can be questioned that the basing of ceiling prices on a standard related to past profits is permissible. See, e. g., *Gillespie-Rogers-Pyatt Co. v. Bowles*, 144 F. 2d 361 (E. C. A.); *315 West 97th Street Realty Co., Inc. v. Bowles*, 156 F. 2d 982, 985 (E. C. A.), certiorari denied, 329 U. S. 801; *Curtiss Candy Co. v. Clark*, 165 F. 2d 791, 795 (E. C. A.), certiorari denied, 334 U. S. 820. See

⁶³ Steel prices are now being maintained under a voluntary agreement, entered into under Section 402 (a) and 708 of the Defense Production Act, and no maximum price regulation covering steel has been issued. However, the companies are free at any time to withdraw from that voluntary agreement and to set their own prices, thus impelling OPS to issue a price regulation. Accordingly, if OPS refused a request by the companies for a price increase, they would be able to obtain administrative and judicial review (in the Emergency Court of Appeals) by withdrawing from the voluntary agreement and protesting and appealing the price regulation or order which would undoubtedly follow. See fn. 64, *infra*, p. 84.

also Cavers, et al., *Problems in Price Control: Pricing Standards*, Office of Temporary Controls, Office of Price Administration (Historical Reports on War Administration: Office of Price Administration, General Publication No. 7) (1947); c. 2, "Industry Earnings Standard," pp. 27-89; Nathanson, *Problems in Price Control: Legal Phases*, Office of Temporary Controls, Office of Price Administration (Historical Reports on War Administration: Office of Price Administration, General Publication No. 11) (1947), pp. 5 ff.⁶⁴ Since this is so, we do not perceive how an imposition of additional labor costs whose effect, if any, on plaintiffs' profits is merely to reduce them to the maximum permissible level, can be said to work the kind of irreparable injury which would warrant a court of equity in interposing its hand to enjoin action taken by the President to meet a grave national emergency:

We do not mean to suggest that this Court need pass on the present controversy between the plaintiffs and the Office of Price Stabilization. But the fact that plaintiffs would have been willing to agree to wage increases such as those which they now complain are threatened to be

⁶⁴ In any event, plaintiffs have an adequate procedure by which any attack on that method of fixing prices could be made. Sections 407 and 408 of the Defense Production Act; *Yakus v. United States*, 321 U. S. 414. See fn. 63, *supra*, p. 83.

imposed on them, provided only a substantial price increase were allowed, certainly sheds light on their claim that imposition of those terms would result in enormous and irreparable injury. Just as, in the event of a taking, compensation for any amount in excess of the established lawful ceiling price cannot be allowed save in exceptional circumstances, *United States v. Commodities Trading Corp.*, 339 U. S. 121, so we think that in the present situation a threatened loss of profits, which leaves those profits at or above the level at which plaintiffs' ceiling prices are certainly "generally fair and equitable to sellers and buyers of such material or service and to sellers and buyers of related or competitive materials and services," (Defense Production Act, Sec. 402 (b) (2)), can hardly be said to result in such irreparable injury as would justify the issuance of an injunction nullifying the President's act. Cf. *Lichter v. United States*, 334 U. S. 742. And to the extent that plaintiffs' ceiling prices may, as a result of increased costs, become less than "generally fair and equitable", they have an adequate remedy by application to the Office of Price Stabilization for a price increase. See *supra*, pp. 82-84.

2. *Any injury to plaintiffs is more than counterbalanced by the injury to the public from the granting of an injunction.*—Assuming, however, that plaintiffs' showing, by itself, is sufficient to establish irreparable injury to them, that show-

ing must be balanced against the showing of injury to the public from the granting of an injunction. The rule is well settled that "an injunction is not a remedy which issues as of course," *Harrisonville v. Dickey Clay Co.*, 289 U. S. 334, 337-338. Particularly where great public interests are involved, it is established that "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry. Co. v. Sys't'n Federation*, 300 U. S. 515, 552.

In accordance with these principles, we think it clear, that the district judge erred in granting a preliminary injunction here. As this Court has said in *Yakus v. United States*, 321 U. S. 414, 440, the award of an interlocutory injunction even in private cases "has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff." See opinion of the Court of Appeals below, 448-449. See also *Tennessee Valley Authority v. Tennessee Electric Power Co.*, 90 F. 2d 885 (C. A. 6), certiorari denied, 301 U. S. 710; *Eighth Regional War Labor Board v. Humble Oil Co.*, 145 F. 2d 462, 464-465 (C. A. 5), certiorari denied, 325 U. S. 883; *Communist Party of United States v. McGrath*, 96 F. Supp. 47 (D. D. C.).

The injury to the public interest from any return to the *status quo* which existed on the night

of April 8, 1952, would be enormous and irreparable, affecting our national safety, our discharge of international commitments, and the lives of our soldiers. See pp. 9-15, 28-49, *supra*. Unlike the allegations of petitioners' affidavits, many of which we are prepared to controvert, the showing of damage to the public interest from any stoppage of production is not, and cannot be, controverted.⁶⁵ The district judge erroneously rejected that showing. He doubted whether he should balance the equities at all (R. 74). Moreover, in attempting to do so, he assumed, contrary

⁶⁵ In this connection, we wish to point out that many of plaintiffs' affidavits were not served on counsel for defendant until the hearing on preliminary injunction. Thus, the Stephens affidavit and others submitted by the U. S. Steel Company were filed April 24, 1952 (R. 96, 99), the day of the hearing on preliminary injunction. Excerpts were read at the hearing (294-299) but defendant's counsel did not receive copies until the lunch recess.

On the other hand, defendant's affidavits were actually served in two of the cases, Republic, No. 1539, and Youngstown, No. 1550, on April 15 and in fact, counsel for all the plaintiffs also obtained copies at or about that time, although in some of the other cases they were not formally served until shortly before the hearing.

In the event this case should be remanded for final hearing, we, of course, reserve the right to put plaintiffs to their proof, and to offer contrary proof, on all issues relating to the injury assertedly anticipated by them. We, accordingly, would not agree that "nothing that could be submitted at * * * trial on the facts" (R. 74) could alter this case. We feel that the complaints can properly be dismissed now on any of the grounds here urged. But if this Court is not willing to order them dismissed, then the preliminary injunction should be vacated and the case remanded for trial.

to fact, that the *status quo* which he sought to preserve did not include any likelihood of a strike. (R. 74, 75). In fact, not only was a strike imminent on April 8, but one began on April 30, 1952, fifteen minutes after Judge Pine's order. Whether that strike was justified or not is aside from the point; any realistic appraisal of the situation should have recognized its likelihood.

In essence, moreover, the judge rested his idea of balancing equities on a prejudging of the merits. He felt that the enormous damage from a cessation of production "would be less injurious to the public than the injury that would flow from a timorous judicial recognition that there is some basis" for the defendant's contentions in this case as he misconceived them (R. 75). We submit the proper procedure is the other way; the balancing of equities must be before determination of the merits, and where public action is sought to be enjoined, the normal presumption of constitutionality of the act of a coordinate branch of the Government should lead the courts, on preliminary injunction, to assume at least a substantial likelihood that the public officer will prevail on the merits, and to consider seriously the damage to the public interest that would re-

sult on the assumption that he acted constitutionally.⁶⁶

On these grounds we urge that no preliminary injunction should have been granted. We go further, however, and urge also that it is clear that no final relief can be granted. The principles of balancing the equities and of endeavoring to avoid injury to the public interest apply to final as well as preliminary injunctions, *Harrisonville v. Dickey Clay Co.*, *supra*; *Hurley v. Kincaid*, 285 U. S. 95; *New York City v. Pine*, 185 U. S. 93, 97; *Virginian Ry. v. Federation*, *supra*; *Pennsylvania v. Williams*, 294 U. S. 176, 185; *United States ex rel. Greathouse v. Dern*, 289 U. S. 352, 360; *Morton Salt Co. v. Suppiger Co.* 314 U. S. 488, 492, 494; *Mercoird Corp. v. Mid-Continent Co.*, 320 U. S. 661, 670. "The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction." *Railroad Commission v. Pullman Co.*, 312 U. S. 496, 500. At the very least, those principles require that any doubts as to the showing of irreparable injury, or as to the availability and adequacy of a remedy at law, be resolved against the plaintiffs in order to avoid

⁶⁶ For the foregoing reasons, the usual rule that granting or denial of a preliminary injunction rests in the trial judge's discretion, *Trice & Adams v. Lathrop*, 278 U. S. 509, 514, is inapplicable here, even assuming that it may never be applied in cases where a wrong exercise of that discretion has led the trial judge erroneously to reach and decide great constitutional issues and to interfere with action of the President.

both the certain and enormous public injury which would flow from a granting of an injunction and also the necessity for passing on constitutional issues of grave moment. In our view, plaintiffs' remedy at law is certain and entirely adequate. But, in any event, the principle that "a court of equity acts with caution and only upon a clear showing that its intervention is necessary in order to prevent an irreparable injury," *Hurley v. Kincaid, supra*, 104n., which has been applied in cases involving far less threat to the public and presenting no important constitutional issues, clearly requires that plaintiffs be left to that remedy for whatever injury, if any, they may suffer.

It should be strongly emphasized that the basic issue is not whether the plaintiffs will suffer damage. Rather, the point is whether any damages which they may incur from continuance of the seizure will outweigh the injury to the public from the grant of an injunction. At this stage it is ~~entirely~~ conjectural whether in fact any damage to plaintiffs will have resulted from the President's acts. But it is certain that grave and incalculable harm will follow the continuance of a restraint on defendant. At the same time, it appears highly probable, if not absolutely certain, that the plaintiffs have a sufficient judicial remedy under the Tucker Act. But whether they have or not, equity cannot permit a catastrophic injury to the entire public in order to avoid a private injury that may be relatively insignificant.

THE TAKING OF PLAINTIFFS' PROPERTIES WAS A VALID
EXERCISE OF AUTHORITY CONFERRED ON THE PRESI-
DENT BY THE CONSTITUTION AND LAWS OF THE
UNITED STATES

A. GENERAL NATURE OF THE AREA OF CONSTITUTIONAL POWER
INVOLVED

For the reasons and under the principles set forth in the preceding point, this Court need not here reach constitutional issues. If, however, constitutional issues are to be reached, they must be considered and resolved in the light of the well settled rule, another aspect of judicial restraint in the delicate process of constitutional adjudication, that courts will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, N. Y. & P. S. S. Co. v. Emigration Commissioners*, 113 U. S. 33, 39; *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 347 (concurring opinion); *Rescue Army v. Municipal Court*, 331 U. S. 549, 569; *Federation of Labor v. McAdory*, 325 U. S. 450, 461. Moreover, neither here, nor in any constitutional case, is the Court faced with the need to solve an abstract problem. On the contrary, " * * * the constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular condi-

tions * * *.” *Home Building & Loan Association v. Blaisdell*, 290 U. S. 398, 426; and see Opinion of Attorney General Murphy, 39 Op. A. G. 343, 347-348.

Given these two principles, precise analysis of the nature of the problem presented will serve to eliminate much of the rhetoric which has characterized plaintiffs' approach in these cases. It will also serve to sustain, beyond doubt, the validity of the action taken by the President on the night of April 8. On that night, the President took action, purely temporary in nature and subject to various limitations, to meet a critical emergency. And he so acted in the discharge of his constitutional function as Chief Executive and as Commander-in-Chief, of his unique constitutional responsibility for the conduct of foreign affairs, and of his constitutional power and duty to execute the laws. In short, he brought to solution of the emergency the sum of his powers.

1. Separating these elements, first, it cannot be denied that the Presidential action, with which this Court is concerned is intended to be temporary in nature. Less than a day after the issuance of the Executive Order, the President, in a message to Congress, stated that he had undertaken to provide for “temporary operation of the steel mills by the Government” and that he wanted to see Government operation “ended as soon

as possible." House Document No. 422, 82d Cong., 2d Sess., 98 Cong. Rec. 3962. See also the President's letter of April 21, 1952, 98 Cong. Rec. 4192. In both of these messages to Congress, moreover, President Truman has expressed a readiness to abide by any program or directive which Congress may enact with regard to the emergency situation presented by the threatened shut-down of the steel mills.

2. That the President's action on the night of April 8 was taken in response to a pressing emergency cannot seriously be questioned. Plaintiffs have not controverted, nor can they, the recitals of the executive order or the supporting affidavits which were introduced on behalf of Secretary Sawyer in the district court. *Supra*, pp. 9-15. From these, and from the detailed statement set forth above, pp. 28-49, it is clear beyond question that the President acted in a situation of national emergency in which a shut-off of steel supplies would have been catastrophic. Thus, putting to one side the fact that no issue has been raised as to the findings upon which the President's action was based and assuming that such findings are subject to judicial review, the President's action was clearly based upon and directed to an emergency. This Court has stated that it will inquire into the correctness of such recitals only to determine "whether in the light of all the facts and

circumstances there was any substantial basis" for the challenged action. *Hirabayashi v. United States*, 320 U. S. 81, 95; and compare *United States v. Russell*, 13 Wall. 623, in which this Court concluded that a constitutional emergency existed in a case in which the sole evidence was the bare statement of the assistant quartermaster commandeering the ships that "imperative military necessity requires the services of your steamers for a brief period." "There is no need, however, for us to labor any such restraints upon judicial inquiry in these cases. It is inconceivable that, as a matter of fact, this Court could do other than to conclude that the President was faced by the gravest sort of national crisis on April 8.

¹ This principle is particularly applicable where, as here, the President's decision rested in large part on information available to him as to military and international considerations. Cf., *C. & S. Air Lines v. Waterman Corp.*, 333 U. S. 103, 111:

The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences.

3. The sources of the President's power to act must similarly be considered in the light of the actual situation in which the President acted. Whatever view might be taken, broad or narrow, as to the scope of the President's function under any particular clause of Article II of the Constitution, we think it clear that the complex and completely integrated nature of the situation in which the emergency arose brought into play all of his powers.

Each part of the Constitution, as well as the charter as a whole, must be given living and flexible meaning so that it can be ever adapted to vastly differing occasions in the course and development of our national life. "It is no answer * * * to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—'We must never forget that it is a constitution we are expounding' (*McCulloch v. Maryland*, 4 Wheat. 316, 407)—'a constitution

intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.' *Id.*, p. 415. When we are dealing with the words of the Constitution, said this Court in *Missouri v. Holland*, 252 U. S. 416, 433, 'we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters * * *. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.' " *Home Bldg. & L. Assn. v. Blaisdell*, 290 U. S. at 442-443.

Thus, even if the validity of the President's action in these cases had to be resolved exclusively in terms of any one of the granting clauses of Article II, as plaintiffs appear to insist, we submit that each clause is sufficiently broadly drawn and wide in purpose to support emergency executive action.

Section 1 of Article II provides that "the executive Power shall be vested in a President of the United States of America." In our view, this clause constitutes a grant of all the executive powers of which the Government is capable. Cf. *Myers v. United States*, 272 U. S. 52; *Works of Alexander Hamilton* (Lodge Ed.), Vol. 4, p. 438; Theodore Roosevelt, *Autobiography*, pp. 388-389. Remembering that we do not have a parliamentary form of Government but rather a tripartite system which contemplates a vigorous executive

(*The Federalist*, Nos. 70 and 71; see also Thach, *The Creation of the Presidency, 1775-1789* (Johns Hopkins University Studies, 1922), Chapters IV, V), it seems plain that Clause 1 of Article II cannot be read as a mere restricted definition which would leave the Chief Executive without ready power to deal with emergencies. Here, as in connection with each aspect of the President's constitutional powers, a specific and compelling frame of record is provided by the nature of the grave crisis with which the country was faced in the event of a production stoppage in the steel industry.

Again, Section 2 of Article II provides that "the President shall be Commander-in-Chief of the Army and Navy of the United States * * *." Powers stemming from the President's position as Commander-in-Chief, specifically invoked in Executive Order 10340 (R. 6), are also clearly available as the basis for the challenged action in these cases. Cf. *The Prize Cases*, 2 Bl. 635. The place of steel at the very heart of our defense and combat activities, and those of our allies, is forcefully demonstrated by the material described above, pp. 39-49. Included in any consideration of the relationship between steel production and the President's position as Commander-in-Chief must be a genuine recognition of his affirmative power in connection with the safety and effectiveness of American troops in Korea. *Hirota v.*

MacArthur, 338 U. S. 197, 207-208 (Mr. Justice Douglas, concurring). From this basis alone, we submit, would stem ample power to "supply an army in a distant field * * *," *United States v. Russell*, 13 Wall. 623, 627, to take whatever steps were necessary to insure that no condition of danger be created by reason of a failure of supply of steel. Perhaps the most forceful illustration of the scope of Presidential power in this connection is the fact that American troops in Korea, whose safety and effectiveness are so directly involved here, were sent to the field by an exercise of the President's constitutional powers.

In addition to the general grant of executive power in Section 1 and the powers thus clearly stemming from the Commander-in-Chief clause, the President is under the duty imposed on him by Section 3 of Article II to "take Care that the Laws be faithfully executed." The broad scope of Section 3 has been delineated by this Court (*In re Neagle*, 135 U. S. 1, and, again, in *In re Debs*, 158 U. S. 564; see also Statement by Attorney General Jackson, June 10, 1941, 89 Cong. Rec. 3992) and is also available to justify the action taken by the President in these cases as a necessarily implied part of his express obligation to carry out our national policy to deter and repel aggression. See *supra*, pp. 28-39; *infra*, pp. 144-150.

But the validity of the President's action on April 8 is not to be determined, either as a matter of common sense construction or as a matter of historic judicial method, by reference to one specific clause. On the contrary, from the beginning of the Republic, it has been recognized that Presidential power to act on a particular occasion may derive from more than one of the grants contained in Article II. For example, the legislative decision of 1789 as to the removal power of the President was bottomed upon both the vesting of the executive power in the President and upon his power and duty to take care that the laws shall be faithfully executed. See Substitute Brief for the United States on Reargument in *Myers v. United States*, No. 2, October Term, 1926, pp. 49-91. And this Court's decision on this question in *Myers v. United States*, 272 U. S. 52, was likewise based not upon a single provision of Article II but upon the combined force of the several provisions. Similarly, the doctrine, announced as early as 1800 by Chief Justice Marshall as a Member of the House of Representatives, that "the President is the sole organ of the nation in its external relations, and its sole representative with foreign nations" (*Annals of Cong.*, 6th Cong., col. 613) does not rest upon any single provision of Article II but upon a combination of provisions. Cf. *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304; *United States v. Pink*, 315 U. S. 203. Again, the

authority and ability of the President to execute the laws depends not only on the provision that "he shall take Care that the Laws be faithfully executed," but also upon his authority as Chief Executive, as Commander-in-Chief, and as the organ of foreign relations. Cf. *In re Neagle*, 135 U. S. 1; *In re Debs*, 158 U. S. 564.

It is thus plain that, in the light of the circumstances which confronted the President on April 8, there could be no justification for a requirement that his action be seen as confined to any one of the provisions set forth in Article II. On the contrary, this power to act must be taken as having sprung from all the available clauses.² Cf.

² History records numerous well-known incidents in which executive powers taken as a whole have been broadly exercised, and we think it unnecessary to rehearse them here extensively. A few notable examples, which readily come to mind, may be mentioned. Perhaps the earliest instance of broad executive action is President Washington's Neutrality Proclamation of 1793, which was at first criticized as an usurpation of authority but "has now come to be regarded as one of the greatest and most valuable acts of the first President's Administration." *Myers v. United States*, 272 U. S. at 137. Authority for its issuance has been laid in the provision vesting the executive power in the President and in the provision empowering him to execute the laws. Cf. 7 Hamilton, *Works of Alexander Hamilton* (1851) pp. 80-81; 2 Story, *Commentaries on the Constitution* (1891) Sec. 1570. Similarly, such incidents as the suppression of the Pennsylvania Whiskey Rebellion by President Washington, President Jackson's Proclamation of 1832 that he would employ force to prevent the execution of the South Carolina Ordinance of Nullification, and President Cleveland's dispatch of troops to Illinois in 1894 in connection with the Pullman

Woods v. Miller Co., 333 U. S. 138, 144. Rigid concepts, comparable to notions of common law pleading, which would require either the President or the Congress to specify particular powers as the basis for necessary and valid action, at their peril, should be taken as of no more value in resolving the living problems present in these cases than is the discredited technique of constitutional interpretation, based on "immutable" principles, which was employed by the court below.

4. We have sought to show affirmatively the precise nature of the area of constitutional powers involved in these cases. We think it plain that the action to be tested must be seen as temporary in nature and taken in an emergency situation and must be measured against a variety of

Company strike were constitutionally authorized by virtue of the President's power to execute the laws, his power as Commander-in-Chief, and the vesting in him of executive power. Cf. *In re Debs*, 158 U. S. 564. Again, based on these sources of authority and upon the President's power in the field of foreign relations, President Tyler, without statutory authority, sent naval vessels and soldiers to Texas in 1844 to protect Texas against Mexican aggression pending Senate ratification of the Treaty of Annexation which he had negotiated. Indeed, in reliance upon this aggregate of Presidential powers, there have been more than 100 occasions in which the Presidents, without Congressional authorization and in the absence of a declaration of war, have ordered our armed forces to take action or maintain positions abroad to protect the lives and property of the United States citizens, to protect the honor of the United States, to open areas to the foreign commerce of the United States and to defend the United States. See H. Rept. 127, 82d Cong., 1st Sess., pp. 55-62.

constitutional powers granted to the President by Article II. The narrow constitutional question actually presented, then, is one of means, whether seizure is a method available to the President, in the exercise of his constitutional powers, to avert a crisis of this type.

B. THE PRESIDENT, WITHOUT SPECIFIC STATUTORY AUTHORITY, MAY SEIZE PROPERTY TO AVERT CRISES DURING TIME OF WAR OR NATIONAL EMERGENCY, SUBJECT TO THE PAYMENT OF JUST COMPENSATION

Turning then to the precise question presented here, it should first be noted that, where the President possesses constitutional powers to meet emergencies, he necessarily has "wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it." *Hirabayashi v. United States*, 320 U. S. 81, 93. Second, it cannot be overemphasized that, considered as federal governmental action, there can be no doubt of the validity of what was done. That is to say, if precisely such a seizure made in precisely this manner and followed by precisely the same actions or proposed actions in respect of the management of the seized plants had been taken under explicit Congressional authorization, there could, we submit, be no conceivable question of its validity. Cf. *United States v. United Mine Workers*, 330 U. S. 258; *Du Pont de Nemours & Co. v. Davis*, 264 U. S.

*456, 462; *United States v. Montgomery Ward & Co.*, 150 F. 2d 369 (C. A. 7), vacated as moot, 326 U. S. 690; *Ken-Rad Tube & Lamp Corp. v. Badeau*, 55 F. Supp. 193 (W. D. Ky.); *Alpirn v. Huffman*, 49 F. Supp. 337 (D. Neb.).²

The real question here, therefore, is whether seizure was a means available to the President, in the exercise of his constitutional powers, to meet the pressing emergency which faced the nation. On this issue, ample support is to be found in executive and legislative precedent for the President's action. Moreover, there is direct judicial recognition of executive seizure as a means of meeting emergency situations.

1. *Executive construction.*—During the Revolution and the War of 1812 there were numerous

² It should perhaps be emphasized that the President's action in no way violates any of the prohibitions on governmental action contained in the first ten Amendments. There is no question here, for example, of any infringement by the President of the rights of freedom of speech, religion, or press guaranteed by the First Amendment, or of the right to be secure from search and seizure guaranteed by the Fourth Amendment or of the rights of jury trial, privilege against self-incrimination, assistance of counsel, etc., guaranteed by the Fifth and Sixth Amendments. The President's action is entirely consistent with the rights of property guaranteed by the Fifth Amendment. That amendment expressly recognizes that private property may be taken for public use upon payment of just compensation, and we concede that just compensation will here be payable in respect of any injury which the plaintiffs may prove to have resulted from the taking. See Point I A, *supra*. The invasion of property rights is only to the extent and for the period of time necessary to meet the emergency.

instances of taking of property for the benefit of the armed services by military officers. While the exact nature of these takings is seldom clear from the available records, most of them appear to have been based entirely on executive authority. The records show that during the Revolution, the buildings of Rhode Island College, as well as other buildings throughout the country, were taken over for use as hospitals and barracks. Other instances were the taking of wagons, horses, and slaves required for public service. During the War of 1812 the property of traders at Chicago was taken to prevent its falling to the enemy, rope walks at Baltimore were destroyed for the same purpose, a house was taken to hold military stores and was later blown up to prevent those stores falling to the enemy, and, in Louisiana, General Jackson freely took plantations, fencing, and supplies as the emergency dictated.* By the

* American State Papers, Class IX, Claims No. 86, p. 197; No. 581, p. 833; No. 590, p. 838; No. 243, p. 424; No. 258, p. 441; No. 266, p. 446; No. 345, p. 521; No. 356, p. 525; No. 461, p. 649.

In case No. 461, p. 649, General Swartwout, under order of General Wilkinson, took certain vessels to be used in operations on the St. Lawrence in 1813. The general was sued in a New York state court and judgment was given against him for \$2500.00. The Committee on Military Affairs recommended that this sum be repaid to General Swartwout, saying "In the circumstances of war, such exigencies will frequently occur, in which the commanding officer will stand justified in taking, by force, such necessities, either for support or conveyance, as are absolutely indispensable and which cannot be obtained by any other means."

close of the War of 1812, it was firmly established that property could be taken in wartime emergencies as an exercise of independent executive power.

More pertinent parallels in history are found during the administrations of Presidents Lincoln, Wilson, and Franklin D. Roosevelt.

The first discovered instance of a taking by order of the President himself, as distinguished from a taking by a subordinate military official, occurred in the first year of the Civil War.⁵ On April 27, 1861, Secretary of War Cameron, at the direction of the President, issued a declaration taking over the railroads and telegraph lines between Washington and Annapolis.⁶

Confronted with secession President Lincoln exercised greater executive power than had been exercised by any previous President. His most dramatic act of executive taking was his Emancipation Proclamation of January 1, 1863, an action resting exclusively on his constitutional powers as

⁵ The power of seizure of private property had apparently also been exercised during the War with Mexico by military officers. One such seizure resulted in the celebrated case of *Mitchell v. Harmony*, 13 How. 115, which is discussed in detail *infra*, pp. 126-131.

⁶ War of the Rebellion, Official Records of the Union and Confederate Armies, Series I, v. II, p. 603. Secretary Cameron's correspondence shows that he acted with full Presidential authority. *Ibid.*, 604. For details of the control, see *ibid.*, pp. 605, 609, 610, 611, 623.

Commander-in-Chief.' Although the Proclamation was operative only in the Confederate areas, it is indicative of Lincoln's basic conception of the power of the Chief Executive in time of war. He said in a comment on the constitutionality of the Proclamation:

I think the Constitution invests its Commander-in-Chief with the law of war in time of war. The most that can be said—if so much—is that slaves are property. Is there—has there ever been—any question that by the law of war, property, both of enemies and friends, may be taken when needed? And is it not needed whenever taking it will help us, or hurt the enemy?*

* Less pertinent here, but equally broad and vigorous, were the actions taken by Lincoln when, without statutory authority, he increased the size of the Army and the Navy, ordered the payment from the Treasury of monies to those not authorized to receive it, and suspended the writ of *habeas corpus*. Corwin, *The President, Office and Powers* (1948 ed.), pp. 277-278. In addition, he proclaimed a blockade of the Southern ports and ordered the taking of blockade-runners, an order which, although without congressional authorization, was upheld in the *Prize Cases*, 2 Bl. 635.

* Letter to James C. Conkling, Aug. 26, 1863, IX Nicolay and Hay, *Works of Abraham Lincoln*, 95 at 98. The effect of the Emancipation Proclamation was considered in a number of cases, but none has been discovered which relate to the immediate problem. *The Emancipation Cases*, 31 Tex. 504 (1868); *Slaback v. Cushman*, 12 Fla. 472 (1869); *Dorris v. Grace*, 24 Ark. 326 (1866); *Morgan v. Nelson*, 43 Ala. 586 (1869).

Following the precedent set by President Lincoln, Wilson, too, exercised his constitutional powers to seize the property of the Smith & Wesson Company on August 31, 1918. See Testimony of Attorney General Biddle, Hearings, House Select Committee To Investigate Montgomery Ward Seizure, 78th Cong., 2d Sess., pursuant to H. Res. 521, June 8, 1944, pp. 167-168. In describing that action in a letter to striking workmen of the Remington Arms Company in Bridgeport, Connecticut, Wilson stated (Baker, *Woodrow Wilson, Life & Letters, Armistice* (1939), Vol. 8, pp. 401-402):

The Smith & Wesson Company, of Springfield, Mass., engaged in government work, has refused to accept the mediation of the National War Labor Board and has flaunted its rules of decision approved by Presidential Proclamation. With my consent the War Department has taken over the plant and business of the Company to secure continuity in production and to prevent industrial disturbance.

It is of the highest importance to secure compliance with reasonable rules and procedure for the settlement of industrial disputes. Having exercised a drastic remedy with recalcitrant employers, it is my duty to use means equally well adapted to the end with lawless and faithless employees.

In addition to his actual seizure of Smith & Wesson and his threat of a similar measure as a

sanction against the employees of the Remington Arms Company (Corwin, *op. cit. supra* (1948), p. 298), Wilson also seriously contemplated the seizure of the Colorado coal mines in 1914 because of a strike there. No seizure was effected, however. *Woodrow Wilson Papers*, File 6, Box 393, Nos. 901, 902, Division of Manuscripts, Library of Congress; Corwin, *op. cit. supra* (1948), p. 453, n. 107.⁹

⁹ Prior to his accession to the Presidency, Wilson had expressed views comparable to Theodore Roosevelt's "stewardship" theory of executive power. Wilson, *Constitutional Government in the United States*, pp. 88-89. During World War I, he adhered to those views, and, acting without statutory authority, created a War Industries Board, a War Labor Board, and a Committee on Public Information. Berdahl, *War Powers of the Executive*, p. 172. On April 28, 1917, he ordered that all telegraph and telephone lines and cables be operated only pursuant to regulations of the Secretary of War or the Secretary of the Navy, although there was no statutory authority for this action. On July 13, 1917, again without statutory authority, Wilson issued a proclamation preventing German marine and war-risk insurance companies from operating in the United States on the ground that the German Government apparently was obtaining information concerning ship movements through these companies. Again in 1917, President Wilson asked Congress to arm merchant vessels and when such authority was not forthcoming he, as an exercise of his constitutional powers, gave notice of determination to arm all American merchant vessels and placed naval personnel and guns thereon. From 1917 to 1922, troops were sent into the States more than 30 times, a majority of these instances being in connection with labor disputes. Corwin, *op. cit. supra* (1948), pp. 287, 166; Berdahl, *op. cit. supra*, pp. 68-70, 200.

The most recent and extensive exercise of the executive power to seize property without statutory authority occurred during the administration of President Franklin D. Roosevelt. On twelve occasions prior to the enactment of the War Labor Disputes Act on June 25, 1943 (57 Stat. 163, 50 U. S. C. App. 150-1511), which authorized the seizure of plants, President Roosevelt issued Executive Orders taking possession of various companies when it appeared that a work stoppage would seriously impede operations.¹⁰ The first seizure occurred as much as six months prior to Pearl Harbor,¹¹ and a total of

¹⁰ List of plants and facilities taken by President Roosevelt prior to the passage of the War Labor Disputes Act.

Executive Orders	Date	Concerns Involved
Executive Order No. 8773	June 9, 1941	The North American Aviation Pl.
Executive Order No. 8868	August 23, 1941	Federal Shipbuilding & Drydock Co.
Executive Order No. 8928	October 30, 1941	Air Associates, Inc.
Executive Order No. 8944	November 19, 1941	Grand River Dam Project.
Executive Order No. 9108	March 21, 1942	Toledo, Peoria & Western R. R. Co.
Executive Order No. 9141	April 18, 1942	Brewster Aeronautical Corp.
Executive Order No. 9220	August 13, 1942	General Cable Company.
Executive Order No. 9225	August 19, 1942	S. A. Woods Machine Co.
Executive Order No. 9254	October 12, 1942	Triumph Explosives, Inc.
Executive Order No. 9340	May 1, 1943	Coal Mines.
Executive Order No. 9341	May 13, 1943	American R. R. Co. of Puerto Rico.
Executive Order No. 9351	June 14, 1943	Howarth Pivoted Bearings Co.

¹¹ This first seizure, of the North American Aviation Plant, was justified by the then Attorney General Jackson as an act within the "duty constitutionally and inherently rested upon the President to exert his civil and military, as well as his moral, authority to keep the defense efforts of the United States a going concern." 89 Cong. Rec. 3992.

three plants were seized before our entry into the War.¹²

Although other Presidents apparently did not have the occasion to meet crises of the magnitude and complexity here presented, brief mention should be made of the following incidents of a similar nature which illustrate the views of others who have occupied the office. President Hayes, in connection with the railway strike of 1877 and on other occasions, did not hesitate to make drastic use of his constitutional powers, including the use of troops. Corwin, *op. cit. supra*, (1948), p. 164. Again, in 1894 President Cleveland, over the objection of the Governor of Illinois, sent troops to Chicago in connection with the Pullman strike

¹² Less pertinent here but equally significant were other actions taken by President Roosevelt without statutory authority, both during the depression emergency and the war emergency. A notable illustration during the depression was the National Bank Holiday. The emergency caused by the war in Europe required a frequent exercise of his constitutional powers both before and after the attack on the United States. A familiar exercise of these powers, for which Wilson in World War I had set a notable precedent in the War Industries Board and other agencies, was in the creation of executive agencies. Thus, the Office of Price Administration and Civilian Supply and the Office of Emergency Management were created by the President long before our entry into the War. Among the others created before or after the beginning of World War II by executive order were BEW, NWLB, OCD, ODT, OWI, OPM, WMC and NHA. Other types of executive action taken included the occupation of Iceland by our troops, and action taken in connection with labor disputes. Corwin, *op. cit. supra*, (1948), pp. 293, 294, 299, 300, 493, 494.

in order to remove obstructions to interstate commerce and the passage of mails. President Cleveland proclaimed that this action was taken for the purpose of enforcing the faithful execution of the laws of the United States and the protection of its property and removing obstructions to the United States mail. An injunction in connection with the strike was sustained in the *Debs* case, 158 U. S. 564, and the use of troops in that instance was approved by the Court as an exercise of the President's constitutional powers to enforce the Federal laws. 158 U. S. 564, 582. Similarly, President McKinley dispatched troops to Idaho in 1899 to suppress the disturbances resulting from a strike of lead and silver miners. Berman, *Labor Disputes and the President* (1942), Ch. II. In 1902, Theodore Roosevelt seriously considered taking possession of the Pennsylvania coal mines during a strike in the mines to prevent a coal shortage. The taking never became necessary because the dispute was settled. 20 *Works of Theodore Roosevelt*, p. 466; Corwin, *op. cit. supra*, (1948), p. 190.¹³ Later in his administra-

¹³ An unpublished opinion of Attorney General Knox, dated October 10, 1902, stating that the President had no power to make such a seizure and, resting the argument largely on the view that a coal strike in Pennsylvania presented matters of local and not federal concern, may be found in the Manuscript Division of the Library of Congress, among the Theodore Roosevelt papers. For a contrary view as to the power of the President in 1902, see *Dakota Coal Co. v. Fraser*, 283 Fed. 415, 417 (D. N. D.), vacated on appeal as moot, 267 Fed. 130 (C. A. 8).

tion, he withdrew from private entry "pending legislation" many parcels of land for forest and coal reserves although the pertinent statutes authorized withdrawal only of lands in which mineral deposits had been found. Corwin, *op. cit. supra*, (1948), p. 147. President Taft, despite his expression of views as an academic matter, did not hesitate to take similar action, in the teeth of existing statute, as a matter of executive power, based on usage. *United States v. Midwest Oil Co.*, 236 U. S. 459. And President Harding, like his predecessors, employed troops to quell the West Virginia Mine disorders of 1921. Berman, *op. cit. supra*, pp. 210-213.

2. *Legislative construction.*—As noted above, the first discovered instance of a Presidential taking was Lincoln's seizure, through his Secretary of War, of the railroad and telegraph lines between Washington and Annapolis in 1861. In January 1862, legislation was enacted which confirmed the Presidential power to take over any railroad or telegraph line in the United States and provided penalties for interference with their operation by the Government (12 Stat. 334).¹⁴ Throughout the debates on the proposed legislation, virtually every Senator and Representative

¹⁴ On February 11, 1862, President Lincoln, pursuant to that statute, took possession of all railroads in the United States. 6 Richardson, *Messages and Papers of the Presidents*, 101.

who addressed himself to the subject either assumed or declared that the President had the inherent constitutional power to take the railroads and telegraph lines if he thought it necessary in the exercise of his war powers. The supporters of the bill advocated its passage as a declaration of existing law and as a means of providing a rigorous system of penalties.

Thus, the sponsor of the bill in the Senate, Senator Wade, stated, "Mr. President, this bill confers no additional power upon the Government, as I understand it, beyond what they possess now. It attempts to regulate the power which they undoubtedly have; for they may seize upon private property anywhere, and subject it to the public use by virtue of the Constitution." Cong. Globe, 37th Cong., 2d Sess., p. 509. And the sponsor of the bill in the House, Representative Blair, similarly stated that the bill "does not confer on the Secretary of War any new or any dangerous powers. The Government has now all the powers conferred by this bill; and the simple object of the bill is to regulate, limit, and restrain the exercise of those powers." *Ibid.*, p. 548.

Equally enlightening was the opposition of Senators Cowan, Browning, Grimes and Fessenden, who voted against the bill on the ground that it was unnecessary and might be construed as a limitation on existing powers. Viewing the question in that light, Senator Cowan, for example,

observed that "When Congress declares war, and provides an army and navy for the President to achieve a particular thing, it confers upon him at the same time all the powers necessary to attain the desired end; and among other things it confers on him power, as has been well said, to impress horses, railroads, telegraph lines, men, teams, everything of that kind into his service, and compel them to work according to his plan and pattern." *Ibid.* p. 516. For similar statements see *ibid.*, p. 512 (Fessenden), *ibid.*, pp. 510, 520 (Browning), and *ibid.*, p. 520 (Grimes).¹⁵

The legislative history of the War Labor Disputes Act of June 25, 1943 (57 Stat. 163, 50 U. S. C. App. 1501-1511) is strikingly similar. The Act was passed in the 78th Congress but finds its antecedent in the 77th Congress. On

¹⁵ The nature of the President's powers was also discussed in the Congress in connection with the Act of July 16, 1918, 40 Stat. 904, which authorized the taking of the telephone and telegraph lines during World War I. Relative to that power, President Harding, then Senator Harding, although opposed to the bill, stated

Mr. President, I listened with a good deal of attention yesterday to the able remarks of the senior Senator from Illinois [Mr. Lewis], and I recall that he said, if there were a real war emergency, if there were a present necessity for the seizure of the lines of communication in this country, the Chief Executive would take them over, else he would be unfaithful to his duties as such Chief Executive. I agree with that statement; and if the President believes that there is such an emergency, he ought to seize them. (56 Cong. Rec. 9064.)

June 5, 1941, Senator Connally introduced S. 1600 (87 Cong. Rec. 4736). This bill was roughly similar to Section 3 of the War Labor Disputes Act as finally enacted, the most notable difference being that the bill covered plants "equipped for the manufacture of any articles or materials" without reference to mining or production. On June 9, 1941, as noted above, p. 109, the President took possession of the North American Aviation plant at Inglewood, California, to end an interruption of production caused by a strike. On June 10, 1941, Senator Connally offered a virtually identical proposal as an amendment to S. 1524, a bill amending the Selective Service Act in certain respects wholly unrelated to the present litigation (87 Cong. Rec. 4932).¹⁶

As with the Civil War Congress, discussed above, it was again generally recognized in consideration of the bill that the President already

¹⁶ The Connally amendment passed the Senate, but was revised into wholly different form and finally rejected altogether by the House. In conference the Connally proposal was adopted but the House rejected the conference report. S. 1524 eventually passed without any amendment on plant seizures. The House Report on the bill is H. Rept. 785, 78th Congress. The House Conference report is reprinted at 87 Cong. Rec. 6331 and the report was rejected by the House at 87 Cong. Rec. 6424. I November 1941, Senator Connally introduced a new bill, S. 2054. The bill was reported favorably. Meanwhile, war was declared, and Senator Connally abandoned the bill for the remainder of the 77th Congress, in view of the President's creation of the War Labor Board.

had full constitutional power to take the actions contemplated by the Act. Again, some Congressmen voted against the bill on the ground that it was unnecessary but others thought legislative action desirable to remove any possible doubt. Representative May, Chairman of the House Military Affairs Committee, to which the bill was referred, said (87 Cong. Rec. 5895):

Mr. Chairman, if any Member thinks that is wrong, that it is wrong that the President should have this power to take over an industry for the purpose of policing it just because one or two men may object, that Member will have the opportunity to express himself by his vote; but let me tell you a few things. We hear it said the President already has power to do this. I think he has, and I think he exercised it wisely when he took over the plant in Inglewood, Calif. * * *

Representative Whittington, supporting the bill, said (87 Cong. Rec. 5972):

We approve the course of the President of the United States in the North American air plant in California. It was never argued; it was never stated by the Attorney General that the President had such authority under section 9 of the Selective Service and Training Act. It is only maintained that he had that authority under the Constitution as Commander in Chief. I say that the bill should be enacted and that

the President of the United States should be given the power by statute to do that which he did in the case of the aviation company in California.

On the other hand, Representative Dirksen contended that the bill was unnecessary (87 Cong. Rec. 5974):

Secondly, let me submit to you that the Commander in Chief who can occupy Iceland with the troops of the United States and advise Congress of this action 6 days later does not need any legislation to occupy a plant in the United States of America. He has done it once and he can do it again. Surely no proponent of the pending bill will arise to confess that what the President did before in California was or is illegal.¹⁷

The Connally proposal, which had first been debated after the President's seizure of the North America plant, was again introduced by the Senator in the 78th Congress after the seizure of the coal mines. As introduced the bill was substantially the same as S. 2054, considered in the previous Congress, and it was speedily reported favorably without Committee hearings.¹⁸ The congressional debate reveals no purpose to impugn the President's constitutional power but,

¹⁷ Similar views as to the President's power were expressed by Rep. Dworshak, 87 Cong. Rec. 5901, Rep. Faddis, *ibid.*, 5901, Rep. Harter, *ibid.*, 5910, and Rep. Hook, *ibid.*, 5975.

¹⁸ S. Rep. 147, 78th Cong., 1st sess.

rather, indicates to the contrary. In the course of discussion, Senator Connally described on several occasions the object and scope of the bill (89 Cong. Rec. 3807):

There is no explicit and definite provision in any statutory enactment authorizing the taking over of plants on account of labor disturbances. The authority heretofore exercised has been the general power of the President as Commander in Chief of the Army and Navy, and such subsidiary powers as were derived from the War Powers Act. The Second War Powers Act carries a clause with regard to condemnation, under which the Government may take over temporarily any plant or property; but even that does not carry the specific authority. It was my thought that, regardless of the legal technicalities involved, it would be a wholesome thing for the Congress of the United States specifically, and in direct language, to authorize the President to do these things, and to confirm and ratify, if necessary, what the President has done and let the country know that the Congress is squarely behind the President.

Similarly, Senator Austin said (89 Cong. Rec. 3896):

The pending proposal is but a part of the whole picture * * / It merely says that we will supplement the powers enumerated, which are powers given by the Constitution to government, powers which

are inherent with government without being given, anyway, * * *

General acceptance of the President's constitutional powers was also expressed by Senator Lucas, 89 Cong. Rec. 3885, Senator McClellan, *ibid.*, 3887, and Senator Wheeler, *ibid.*, 3887. Senator Tydings offered an amendment which would have specifically ratified the taking of the coal mines. This amendment was defeated on the pleas of Senators Connally and Barkley that such formal language of ratification might cast doubt on the validity of the President's constitutional power to take, *ibid.*, 3989, 3992, 3993.¹⁹

¹⁹After the enactment of the War Labor Disputes Act, identical views were expressed by Attorney General Biddle in advising President Roosevelt as to the legality of the proposed Executive Order [Executive Order No. 9438, 9 F. R. 4459, April 25, 1944], directing the Secretary of Commerce to take possession of, and to operate, certain plants and facilities of Montgomery Ward. Attorney General Biddle concluded that the Act did authorize the action contemplated by the President but pointed out that (40 Op. A. G. 312, 319-320):

It is not necessary, however, to rely solely upon the provisions of section 3 of the War Labor Disputes Act. As Chief Executive and as Commander-in-Chief of the Army and Navy, the President possesses an aggregate of powers that are derived from the Constitution and from various statutes enacted by the Congress for the purpose of carrying on the war. The Constitution lays upon the President the duty "to take care that the laws be faithfully executed." The Constitution also places on the President the responsibility and invests in him the powers of Commander-in-Chief of the Army and Navy. In time of war when the existence of the nation is at stake, this aggregate of powers includes authority to take reasonable steps to prevent nation-wide labor

3. *Judicial precedent.*—Even were there no direct judicial authorities, we believe that these historical precedents would be sufficient support for the President's action here. As Mr. Justice Holmes has cogently observed, “a page of history

disturbances that threaten to interfere seriously with the conduct of the war. The fact that the initial impact of these disturbances is on the production or distribution of essential civilian goods is not a reason for denying the Chief Executive and the Commander-in-Chief of the Army and Navy the power to take steps to protect the nation's war effort. In modern war the maintenance of a healthy, orderly, and stable civilian economy is essential to successful military effort. The Congress has recognized this fact by enacting such statutes as the Emergency Price Control Act of 1942; the Act of October 2, 1942, entitled “An Act to Amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes”; the Small Business Mobilization Law of June 11, 1942; and the War Labor Disputes Act. Even in the absence of section 3 of the War Labor Disputes Act, therefore, I believe that by the exercise of the aggregate of your powers as Chief Executive and Commander-in-Chief, you could lawfully take possession of and operate the plants and facilities of Montgomery Ward and Company if you found it necessary to do so to prevent injury to the country's war effort.

Earlier, on October 4, 1939, Attorney General Murphy had stated as follows in reply to a request of the Senate for his opinion on the war emergency powers of the President:

You are aware, of course, that the Executive has powers not enumerated in the statutes—powers derived not from statutory grants but from the Constitution. It is universally recognized that the constitutional duties of the Executive carry with them the constitutional powers necessary for their proper performance. These constitutional powers have never been specifically de-

is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U. S. 345, 349. Contrary to plaintiffs' assertions that these precedents prove a usage but do not establish its validity, "even constitutional power, when the text is doubtful, may be established by usage." *Inland Waterways Corp. v. Young*, 309 U. S. 517, 525. "Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation." *United States v. Midwest Oil Co.*, 236 U. S. 459, 472–473; *United States v. Macdaniel*, 7 Pet. 1, 13–14.

In any event, direct judicial recognition of the executive power to seize property to avert a crisis in time of war or national emergency is not lack-

defined, and in fact cannot be, since their extent and limitations are largely dependent upon conditions and circumstances. In a measure this is true with respect to most of the powers of the Executive, both constitutional and statutory. The right to take specific action might not exist under one state of facts, while under another it might be the absolute duty of the Executive to take such action. [39 Op. A. G., pp. 343, 347–348.]

ing. As this Court, said in *United States v. Russell*, 13 Wall. 623, 627:

* * * in cases of extreme necessity in time of war or of immediate and impending public danger, * * * private property may be impressed into the public service, or may be seized and appropriated to the public use, or may even be destroyed without the consent of the owner. Unquestionably such extreme cases may arise, as where the property taken is imperatively necessary in time of war to construct defenses for the preservation of a military post at the moment of an impending attack by the enemy, or for food or medicine for a sick and famishing army utterly destitute and without other means of such supplies, or to transport troops, munitions of war, or clothing to reinforce or supply an army in a distant field, where the necessity for such reinforcement or supplies is extreme and imperative, to enable those in command of the post to maintain their position or to repel an impending attack, provided it appears that other means of transportation could not be obtained, and that the transports impressed for the purpose were imperatively required for such immediate use. Where such an extraordinary and unforeseen emergency occurs in the public service in time of war no doubt is entertained that the power of the government is ample to supply for the moment the public wants in that way to the extent

of the immediate public exigency, but the public danger must be immediate, imminent, and impending, and the emergency in the public service must be extreme and imperative, and such as will not admit of delay or a resort to any other source of supply, and the circumstances must be such as imperatively require the exercise of that extreme power in respect to the particular property so impressed, appropriated, or destroyed. * * *

Indeed, judicial controversy in this area has not been over the question whether the power to take exists but whether just compensation was required in view of the circumstances of the taking. In the analysis which follows we shall show (1) that the pertinent cases all hold that the executive may, without statutory authorization, employ seizure as a means of averting impending crisis; (2) that the power to seize is of two types, one based on the police power and the other in the nature of eminent domain; (3) that the police power seizure, which is not involved in this case, does not require compensation; (4) that the eminent domain taking, which is here involved, requires necessity and the payment of just compensation but can be exercised without regard to its physical relation to the field of battle; and (5) that since the owner suffers no greater injury from a taking under the eminent domain power than any other person whose property is taken by the usual legislative-

judicial eminent domain process, a lesser degree of necessity justifies eminent domain takings as contrasted with police power seizures.

(a). The first reported American case discovered, *Respublica v. Sparhawk*, 1 Dall. 357, involved a claim for compensation for property removed from Philadelphia during the Revolution by order of Congress to prevent it from falling into the hands of the enemy. The property later was captured by the enemy in its new location. Compensation for its loss was denied by the Pennsylvania Supreme Court. The taking was compared to those involved in the destruction of buildings to prevent the spread of fire. Although the case did not involve a purely executive taking, the decision played a principal part in the development of the police-power branch of the law.

Two significant developments occurred in the period from the War of 1812 to the Civil War. The first was the emergence in the state courts of a clearer concept of the police power aspect of the executive power, and the second was the earliest Supreme Court decision dealing squarely with the power of the Executive to take property in wartime.

The executive power of taking was dealt with in the state courts in this period in connection with the problem of liability of municipal officers for destruction of buildings to prevent the spread of

fires. The courts reasoned from the war-power precedents like the *Sparhawk* case. Thus, in the leading case of *Mayor of New York v. Lord*, 18 Wend. 126 (1837), involving liability of destruction of buildings in face of fire, the court discussed the problems in terms of the recognized privilege to destroy property without liability in case of such necessity as the advance of a hostile army. While the cases are not unanimous as to compensation, they hold generally, reasoning from the maxim *salus populi est suprema lex* and from the analogy of wartime emergency, that property may be destroyed under such circumstances without compensation.²⁰ In the cases falling in later periods this authority is rested explicitly on the police power.²¹ The leading case of the period is *Parham v. The Justices*, 9 Ga. 341, 348, 349 (1851), a case involving an eminent domain problem not directly relevant to this discussion, but in which the court enunciated a principle often referred to in later decisions that "in cases of urgent public necessity, which no law has anticipated, which cannot await the action of the

²⁰ *Meeker v. Van Rensselaer*, 15 Wend. 397 (1836); *Russell v. Mayor of New York*, 2 Den. 461 (1845); *American Print Works v. Lawrence*, 23 N. J. L. 590 (1851); *Surocco v. Geary*, 3 Cal. 69 (1853); *McDonald v. City of Red Wing*, 13 Minn. 38 (1868).

²¹ *Aitken v. Village of Wells River*, 70 Vt. 308 (1898); *Bowditch v. Boston*, 101 U. S. 16; 2 Cooley, *Constitutional Limitations* (8th ed.) 1313; David, *Municipal Liability in Tort in California*, 6 S. Cal. L. R. 269.

Legislature," property may be taken without compensation on the theory of *salus populi*. The examples given are those arising from the incidence of war.²²

The case of *Mitchell v. Harmony*, 13 How. 115 (1852) was the first to come to this Court involving the executive power of emergency taking. The facts were as follows:

Harmony was a naturalized Spanish-American who took a large wagon train for trading purposes from Independence, Missouri, to El Paso

²² The full quotation is as follows:

"It is not to be doubted but that there are cases in which private property may be taken for a public use, without the consent of the owner, and without compensation, and without any provision of law for making compensation. These are cases of urgent public necessity, which no law has anticipated, and which cannot await the action of the Legislature. In such cases, the injured individual has no redress at law—those who seize the property are not trespassers, and there is no relief for him but by petition to the Legislature. For example: the pulling down houses, and raising bulwarks for the defense of the State against an enemy; seizing corn and other provisions for the sustenance of an army in time of war, or taking cotton bags, as Gen. Jackson did at Orleans, to build ramparts against an invading foe.

"These cases illustrate the maxim, *salus populi suprema lex*. Per Buller, *J. Plate Glass Co. v. Meredith*, 4 T. R. 797. Noy's Maxims, 9th ed., p. 36. Dyer, 60 b. Broom's Maxims, 1. 2 Bulst. 61. 12 Coke, 13. [*The Saltpetre Case*, ed. note] Ib. 63. 2 Kent's Com. 338. 1 Bl. Com. 101, note 18, by Chitty. Extreme necessity alone can justify these cases and all others occupying the same ground."

during the Mexican War. Colonel Doniphan's unit, under the distant command of General Kearney, was in El Paso with about 1,000 men at the same time. Doniphan determined to attack Chihuahua, about 300 miles away in Mexico, and by order of his subordinate, Lt. Col. Mitchell, Harmony was compelled to accompany the troops in his wagon train. Other traders in El Paso were given similar orders. The purposes of the orders were threefold: Doniphan felt it necessary to enlarge his tiny military force by adding to it the 300 teamsters in the trading party; he desired the wagons for the formation of corrals on the march in case he should be attacked by the enemy if left behind or, more important in Harmony's case, that Harmony himself might trade with the enemy if left to his own devices.²³ The wagon train was therefore taken to Chihuahua, and subsequently fell into the hands of the enemy there.

Upon his return to the United States, Harmony petitioned Congress for compensation for his losses. Bills for this purpose were considered in both Houses in the 30th and 31st Congresses in 1848, 1849, and 1850, and bills on the subject passed each House. However, no agreement between the two Houses was ever reached, and Har-

²³ Depositions of Doniphan and Major Clark in Record of *Mitchell v. Harmony*, Sup. Ct., No. 178, Dec. term, 1851.

mony thereupon sued Mitchell personally for damages.²⁴

The case was tried before a jury in the Circuit Court in New York with Mr. Justice Nelson, on circuit, presiding. On the basis of Justice Nelson's charge, 1 Blatch. 549, the jury, without leaving its seats, gave a verdict to Harmony for \$90,000.²⁵

Before the case came to this Court, Congress acted. On March 11, 1852, it passed an act, 10 Stat. 727, providing that Mitchell should be represented in the Supreme Court by the Attorney General, and that any judgment resulting should be paid by the United States.

The case thus came to the Court in this posture: Harmony's property had been taken by military action. Despite prevailing sentiment in both Houses of Congress that Harmony should be compensated, no compensation bill had been enacted. Harmony had no way of suing the United States, for the Court of Claims had not yet been created, and such cases as *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, and *United States*

²⁴ For record of Harmony's claim in Congress, see Sen. Misc. Docs. No. 11, 30th Cong., 1st sess.; H. Rept. No. 458, 30th Cong., 1st sess.; Cong. Globe, 30th Cong., 2d sess., 580-581. Senator Mason, in reporting the bill to the Senate, said: "Now, I apprehend it is clear that where private property is seized in time of war by a military officer for public purposes, the owner has a right to claim its value from the Government" (Cong. Globe, *supra*, 580).

²⁵ 13 How. at 141.

v. *Lynah*, 188 U. S. 445, holding the United States liable for takings on a theory of implied contract, were still many years in the future. Indeed, the first decision that the United States possessed a power of eminent domain was still more than twenty years distant, *Kohl v. United States*, 91 U. S. 367 (1876).²⁶ The United States, as the Court knew,²⁷ had assumed Mitchell's liability, and the only possible way of compensating Harmony under the circumstances was by affirming the jury's verdict.

The Court affirmed. It held that the trial judge had correctly instructed the jury that a military officer had the power to take private property for a public use but that the power could be exercised only in the event of an emergency.²⁸ The core of

²⁶ It is significant that the executive power to take property had been often exercised and had been expressly recognized by this Court before the Congressional power of eminent domain became established. The *Russell* case, cited *supra*, p. 122, antedated *Kohl v. United States* by five years.

²⁷ In accordance with the Compensation Act, Mitchell was represented in the Supreme Court by the Attorney General. The case was fully discussed by a Member of Congress with Justice Nelson when the compensation bill was before the House, and the Justice's informal views were before Congress. Cong. Globe, 32d Cong., 1st sess., 663.

²⁸ This emergency power was conceded by counsel for Harmony, who cited as precedent for its existence the New York fire case, *Mayor v. Lord*, *supra*. *Mitchell v. Harmony*, *supra*, 124.

the Court's opinion on this point is contained in the following passage, pp. 133, 134:

There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser.

But we are clearly of opinion, that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.

The Court did not consider whether on the facts in the case an emergency existed that justified the taking. The Court said specifically that that question was not before it; that it was a question of fact upon which the jury had passed and that the Court would confine its considera-

tion to "whether the law was correctly stated in the instruction of the court." 13 How. 134. Thus, although the actual holding of the *Mitchell* case is that the taking was invalid, the Court reached that result solely because of a jury finding that no emergency existed which justified the exercise of power which the Court ruled was possessed by the executive.

(b). As a result of the widespread executive takings during the Civil War, innumerable claims arose before state courts,²⁹ Congress,³⁰ the President, and the Federal courts in the reconstruction years. Congress, after elaborate debate, brought the problem to a sharp issue by passing,

²⁹ In Tennessee and Virginia it was held that action by municipal executives in collaboration with townspeople to destroy liquor which might otherwise have fallen to advancing Federal troops was a justifiable, noncompensable taking on the theory of *salus populi*. *Harrison v. Wisdom*, 54 Tenn. (7 Heisk.) 98 (1872); *Wallace v. City of Richmond*, 94 Va. 204 (1897). Both decisions rely on the conflagration cases discussed above. In Tennessee the impressment of wood for use on a government railroad in a friendly territory was also upheld, *Taylor v. Nashville & Chattanooga Railroad Co.*, 6 Cold (Tenn.) 646 (1869); and the impressment of horses by executive action was upheld in Missouri, *Wellman v. Wickerman*, 44 Mo. 484 (1868).

³⁰ In 1874 a Committee on War Claims of the House of Representatives submitted an elaborate report, usually referred to as the Lawrence Report. H. Rep. No. 262, 43rd Cong., 1st Sess. This report carefully distinguished between seizures on the theory of *salus populi* and takings by eminent domain. Report, p. 45. The report emphasizes that "there is a law overruling necessity, entirely distinct from the right of eminent domain. *Ibid.*, 50.

in 1872, a bill authorizing payment of a claim of J. Milton Best for compensation for destruction of his house by military order in the course of the defense of a fort at Paducah, Kentucky.³¹

President Grant vetoed the Best bill and in so doing enunciated the distinction subsequently adopted by the Supreme Court between two types of wartime takings. He said, in a passage later quoted with approval in *United States v. Pacific Railroad*, 120 U. S. 227, 238:

It is a general principle of both international and municipal law that all property is held subject not only to be taken by the Government for public uses, in which case, under the Constitution of the United States, the owner is entitled to just compensation, but also subject to be temporarily occupied, or even actually destroyed, in times of great public danger, and when the public safety demands it; and in this latter case governments do not admit a legal obligation on their part to com-

³¹ The prolonged debate on the Best bill called forth learned and elaborate argument from many members of Congress. The speakers explored thoroughly all writers and precedents, ancient and modern. Cong. Globe, 41st Cong., 3d sess., 97, 165, 295, 311. A similar discussion in the preceding Congress concerned the claim of Sue Murphey, whose house in Decatur, Alabama, was destroyed by the military authorities for the purpose of construction of fortifications many months after the entire area had been pacified by Union forces. For discussion, see Cong. Globe, 40th Cong., 3d sess., 274, 293, 381.

pensate the owner. The temporary occupation of, injuries to, and destruction of property caused by actual and necessary military operations are generally considered to fall within the last-mentioned principle. If a government makes compensation under such circumstances it is a matter of bounty rather than a strict legal right.³²

Meanwhile, the courts were creating a formal distinction between the two types of executive taking. In *Grant v. United States*, 1 Ct. Cls. 41 (1863), the issue was whether plaintiff should recover for destruction of his property at Tucson, Arizona, by a military order which had as its purpose the keeping of goods out of enemy hands. The court ruled that there were two types of taking of property, one done by eminent domain, and the other under the law of "extreme necessity" (p. 45), and held that, under the eminent domain power, private property might be rightfully taken by military officers without legislative authority (p. 47). Acknowledging that this power might be exercised only in circumstances of necessity, the court laid down this general rule as the measure of necessity (pp. 47, 48):

The necessity must be urgent, but it need not be overwhelming; the danger must ap-

³² 7 Richardson, *supra*, 172, 173. President Grant followed these principles in vetoing a subsequent bill for compensation for destruction of a salt works in Kentucky. *Ibid.* 216.

parently be near and impending, but it need not be actually present, threatening instant injury to the public interests.³³

In two reconstruction cases, *United States v. Russell*, 13 Wall. 623, and *United States v. Pacific Railroad*, 120 U. S. 227, this Court further clarified the distinction between eminent domain and police power takings. In both cases, the Court held the executive takings to be lawful. However, because the necessity for, and circumstances of the occasions of taking differed in degree in each case, compensation was held to be due in the *Russell* case and not in the *Pacific Railroad* case.

In *United States v. Russell* the owner of three steamers that had been seized by Army Assistant Quartermasters at various points on the Mississippi during the Civil War brought a suit in the Court of Claims to recover compensation for their use. After temporary use by the Government the vessels had been returned to the owner. A statute had been passed on July 4, 1864, which provided that the jurisdiction of the Court of Claims should not extend to any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the Army or Navy while it was engaged in the suppression of the rebellion. The United States contended that the

³³ A dissenting opinion on grounds unrelated to the subject under discussion here in the *Grant* case is reported at 2 Ct. Cls. 551. The *Grant* case is followed in *Wiggins v. United States*, 3 Ct. Cls. 412 (1867) and see also *Heflebower v. United States*, 21 Ct. Cls. 228, 238 (1886).

taking of the three steamers was an "appropriation" of property within this statute and that therefore the Court of Claims had no jurisdiction to entertain a suit. The Court of Claims rejected the contention and its decision was affirmed by this Court. There was no special showing of emergency other than the bare statements of the Assistant Quartermasters that the ships were needed because of "imperative military necessity" and the Court of Claims made no finding of special necessity (5 Ct. Cls. 121). This Court stated that in extreme emergencies the executive branch of the Government possesses the taking power. It declared that in this case an emergency did exist, that the taking was lawful, that the United States was liable on a theory of implied contract for the use of the vessels, that the taking was not an appropriation within the meaning of the statute of 1864 and that the Court of Claims had properly assumed jurisdiction. See *supra*, p. 122.

The second of this pair of Supreme Court cases was *United States v. Pacific Railroad*. A number of railroad bridges had been destroyed in Missouri by order of the Federal Commander to prevent the advance of the enemy in the Civil War. Other bridges were destroyed by Confederates. Four of those bridges, two of which had been destroyed by the Northern and two by the Southern Armies, were rebuilt by the United States. The issue was whether the cost of the

rebuilding by the United States could be set off against claims of the railroad.

The Court held that the destruction of the bridges was an act of military necessity for which the Government was not liable, and that their reconstruction was also a military necessity for which the Government could not charge the railroads. In reaching its result, the Court considered exhaustively the nature of government liability for the taking of property "during war, by the operations of armies in the field, or by measures necessary for their safety and efficiency" (120 U. S. at p. 239), for which the Government is immune from liability. "The safety of the state in such cases overrides all considerations of private loss. *Salus populi* is then, in truth, *suprema lex*." (120 U. S. at p. 234)³⁴ The other type of taking is described by reference to *Mitchell v. Harmony* and *United States v. Russell*, and in such cases "it has been the practice of the Government to make compensation for the property taken."³⁵

³⁴ In describing this category, the court relied on *Respublica v. Sparhawk*, *Parham v. The Justices*, *Taylor v. Nashville and Chattanooga Ry.*, *Mayor v. Lord*, *Vattel*, and President Grant's veto message in the *Best case*, 120 U. S. 234, 238.

³⁵ "Its obligation to do so is supposed to rest upon the general principle of justice that compensation should be made where private property is taken for public use, although the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the constitutional clause." 120 U. S. at 239.

Once the distinction between compensable and non-compensable, or *salus populi* and eminent domain, executive takings in war-time had been clearly articulated, it followed almost as a matter of course that no rigid requirements of catastrophic emergency would be established for the latter type.

In *Alexander v. United States*, 39 Ct. Cls. 383 (1904), the government, through the Secretary of War, after termination of hostilities in the Spanish-American war but before the treaty of peace had been signed, took possession of a farm in Pennsylvania for training camp purposes, apparently without statutory authorization. The plaintiff had a fee simple reversionary interest in the land which was being temporarily occupied by a tenant. On claim of the tenant, the War Department paid rental for the use of the land, but refused to pay the plaintiff for the permanent injuries done the land during the period of government occupancy. The plaintiff sued for compensation for injuries done his reversionary interests, on an eminent domain theory. The government defended on the ground that if the plaintiff had an injury, the injury was tortious, or, failing this defense, that the taking was one which required no compensation, on the theory of the law of war. The court gave judgment for the plaintiff. Rejecting the Government's second defense, the court noted that the property taken was "more than 1,000 miles from the nearest

approach of a public enemy." But in holding the taking to have been proper and compensable, the court dealt with the element of necessity as follows:

There was a military necessity that some land in that vicinity should be taken. There is always a necessity when property is taken, and it implies no wrong on the part of the Government that it does take property without the consent of the owner. Underlying the exercise of the right is grant of power upon the expressed condition that compensation be made. [*Id.* at 396.]

See also, to the same effect, *Philippine Sugar Estates Development Co. v. United States*, 39 Ct. Cls. 225, 40 Ct. Cls. 33.

In short, at the turn of the century, the existence of executive power to seize private property during time of war or national emergency was firmly established, not only as a matter of executive construction and usage and legislative approval, but also by judicial decision. Viewing this history negatively, the executive power was frequently used and never stricken down. We know of no case which denied the existence of this power nor any instance in which a responsible majority of either House of Congress questioned its existence. Rather, as we have shown, it was always recognized that the executive does have the power and controversy arose only over the question whether a right to just compensation

flowed from the circumstances surrounding the taking.

The *Russell* case, if it stood alone, would, we submit, sustain the President's action here. This Court squarely held there that in time of "immediate and impending public danger * * * private property may be impressed into the public service * * * no doubt is entertained that the power of the government is ample to supply for the moment the public wants in that way to the extent of the immediate public exigency" (13 Wall. at 627-628). And, on the bare statements of the Assistant Quartermasters who commandeered the ships that they were taken because of "imperative military necessity," the Court held the takings to be lawful. Certainly, as we have shown above, pp. 9-15, 28-49, the present public danger is at least as "immediate and impending."

(c). But the *Russell* case, and the others discussed above, do not stand alone. Since the turn of the century, there has been continued judicial recognition of the President's constitutional powers in this area. Although there appears to be no reported litigation as a result of purely executive takings during World War I,³⁶ the existence of the power was pointed out in an occasional strong dictum. See *Roxford Knitting Co.*

³⁶ This circumstance may possibly be accounted for by the great number of requisition statutes in force during that war. See *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 155, for a collection of such statutes.

v. Moore & Tierney, 265, Fed. 177, 179 (C. A. 2); *United States v. MacFarland*, 15 F. 2d 823, 826 (C. A. 4). Similar statements appeared in lower court opinions in World War II. See, e. g., *Ken-~~Rad~~ Tube & Lamp Corp. v. Badeau*, 55 F. Supp. 193, 197 (W. D. ~~Ky.~~); *Employers Group, etc. v. National War Labor Board*, 143 F. 2d 145, 151 (C. A. D. C.), certiorari denied, 323 U. S. 735; *Alpirn v. Huffman*, 49 F. Supp. 337, 340 (D. Neb.) And a recent decision of this Court indirectly confirms the existence of a constitutional power in the President, in the nature of eminent domain, to seize property during time of war or national emergency. *United States v. Pewee Coal Co., Inc.*, 341 U. S. 114.

As in the instant suit, the *Pewee* case involved a non-statutory seizure by executive order of the coal mines on May 1, 1943, to avoid a nationwide strike of miners [Executive Order 9340, 8 F. R. 5695]. Although no question was raised by the parties as to the validity of the seizure (see 115 C. Cls. 626, 676), the issue whether the seizure was an eminent domain taking within the meaning of the Fifth Amendment was squarely joined. It was the Government's position that the seizure did not constitute a taking within the meaning of the Fifth Amendment but that the seized property was merely in the custody of the Government, as would be property under conservatorship or temporary receivership, and

Pewee was not, therefore, entitled to just compensation. The Court rejected the Government's argument. The Court was divided on the question of the measure of just compensation, but it was unanimously of the opinion that there had been a taking of Pewee's property which would require the payment of just compensation under the Fifth Amendment whenever loss is suffered. Although the Court did not expressly so state, it is implicit in the decision in that case that there had been a valid exercise of executive power in the nature of eminent domain or requisition. See *supra*, pp. 67-68.

Finally, the court's attention is particularly directed to District Judge Amidon's disposition of a situation substantially identical to that presented in these cases. *Dakota Coal Co. v. Fraser*, 283 Fed. 415 (D. N. D.), vacated on appeal as moot, 267 Fed. 130 (C. A. 8). The facts were these:—A coal mine strike in North Dakota had been called for November 1, 1919. Lignite coal was the fuel for the western half of the State. Because lignite coal, if exposed to the weather, disintegrates and becomes unfit for fuel, the public needs could be met only by continuous operation of the mines. A few days after November 1, winter set in with an unprecedented snow storm and the temperature fell to 8 to 10 degrees below zero over the whole area supplied by lignite. To meet this crisis, the Governor issued a proclama-

tion calling on the lignite coal mine owners to operate their mines, and, upon their failure to resume production, he called out the militia and seized the mines. Plaintiff mine owners then brought suit for injunctive relief against Fraser, the Adjutant General of the State.

Judge Amidon pointed out that (p. 416):

The owners of the coal mines had already charged their right of private property therein with a public use. The continuance of the public service which such use involves cannot be separated from the right of private ownership. As to compensation, that can best be fixed by negotiation between the parties. But, if this fails, the state has expressly waived its exemption from suit, and the plaintiff may recover the reasonable value of the use of its property.

Continuing, the Judge observed that he knew (pp. 416-417):

* * * the difference between verbal anarchy and real anarchy. I do not think the quiet and orderly operation of the coal mines, which has taken place under the management of the defendants in this case, can properly be characterized as anarchy. On the contrary, if the situation which was presented to the Governor at the time he called out the militia had been permitted to actually arise, and the people had been freezing to death and dying of disease

because of the failure of fuel supplies, and men under the excitement of such a situation as that had been driven to acts of violence to relieve themselves against it, that perhaps might have been spoken of as anarchy.

And, finally, stating that "rhetoric is a poor substitute for coal" (p. 418), Judge Amidon concluded (p. 418):

I am asked to issue a writ of injunction which will necessarily say that the acts of the Governor have been illegal and unconstitutional. If I do that, I am not simply dealing with his acts; I am defining the powers of the Chief Executive of an American commonwealth to meet a crisis which threatens loss of life. I am not willing to strip the Governor of his power to protect society. I do not believe it comports with good order, with wise government, with a sane and ordered life, to thus ~~limit~~ the agencies of the state to protect the rights of the public as against the exaggerated assertions of private rights.

In the light of these authorities, there is no basis for Judge Pine's reference to "the utter and complete lack of authoritative support for defendant's position" (R. 73). Contrast the opinion of the Court of Appeals below (per Circuit Judges Edgerton, Prettyman, Bazelon, Washington, and Fahy) (R. 447-448).

C. THE EXTENSIVE SYSTEM OF LAWS PROVIDING FOR NATIONAL SECURITY, WHICH THE PRESIDENT IS OBLIGATED TO ENFORCE, JUSTIFIED THE TAKING

We have reviewed (pp. 28-49) the admitted, and admittedly compelling, facts of the international situation which threatens intolerable risks and losses if American production of steel, most basic of military and industrial materials, should be interrupted. We have noted the comprehensive scheme of statutes and treaties in which the United States has by law pledged enormous portions of its human and material resources to cope with the continuing international crisis which, if it is not quite "war" on a full modern scale, is surely not peace. Viewed in terms of their total purpose, these laws make it clear that Congress has committed this Nation to a full-scale and increasing national defense program in which the critical production of steel must not be permitted to cease. This necessity for steel in order to carry out the will of Congress calls into play, not only the President's constitutional duty to "take Care that the Laws [treaties as well as statutes, *In re Neagle*, 135 U. S. 1, 64] be faithfully executed," but the whole array of the President's constitutional powers and responsibilities. See pp. 95-101, *supra*. In short, far from being inconsistent, the measures Congress has taken to deal with the national emergency authorize and serve to demonstrate the propriety of the President's action to keep the steel mills functioning.

Cf. *Madsen v. Kinsella*, No. 411, this Term, slip op., pp. 6-7.

We believe, therefore, that, if it were necessary, the President's action could be sustained merely as an exercise of his power and duty to execute the laws faithfully. Recognizing that steel "is the backbone of our economy" and that the steel industry "is of paramount importance both in peace and in war" (H. Rep. No. 2759, 81st Cong., 2d Sess., p. 5), Congress has enacted a series of measures designed to chart the Nation's course "in a struggle for survival" (S. Rep. No. 117, 82d Cong., 1st Sess., p. 3). The fact that the efficacy of these measures would be seriously threatened by a stoppage in steel production sustains the President's action.

For Congress has made it clear that its overriding concern at this juncture in our history is the preservation of our national security, and the statutes and treaties designed for this purpose leave no doubt as to the President's duty. Cf. *Ex parte Quirin*, 317 U. S. 1, 26. Paramount among the tasks Congress has committed to the President for execution is a mammoth effort to supply the material means to enable the United States and the whole "free world to stand secure against the present danger."³⁷ "Our partners

³⁷ H. Rep. No. 872, 82d Cong., 1st Sess., p. 5. This entire document, reporting the bill which became the Mutual Security Act of 1951 (Pub. L. 163, 82d Cong., 1st Sess., October 10, 1951), gives a graphic picture of the world-wide nature of American commitments.

need an uninterrupted supply of equipment to convert their manpower into effective military units.”³⁸ “We have to supply most of the heavy weapons and equipment; we have to supply money, materials, machinery, and know-how to speed up European production of military equipment.”³⁹ And in the supplying of these needs, as well as the needs of our own defense establishment, steel is probably the most vital single material.

The crisis in world affairs needs no further elaboration here. But we wish to emphasize a fact everybody knows—that Congress has acted on a broad scale to cope with the crisis and that this action places imposing responsibilities upon the President to see that our defense efforts succeed. Typifying the urgency which Congress recognizes almost daily in this area is the declaration of the Senate Committee on Armed Services reporting the 1951 Amendments to the Universal Military Training and Service Act (Title I of Pub. L. 51, 82d Cong., 1st Sess.):⁴⁰

The grim fact is that the United States is now engaged in a struggle for survival. The dimensions of that struggle cannot be measured. We do not know how long it will continue; we do not know how or

³⁸ *Id.* at 62.

³⁹ *Id.* at 19.

⁴⁰ S. Rep. No. 117, 82d Cong., 1st Sess., p. 3.

Where a decision will be ultimately reached ;
we do not know what will be required of us.

* * * *

To avoid increasing our national jeopardy, it is imperative that we now take those necessary steps to make our strength equal to the peril of the hour.

Coping with a problem which it, as well as the President, sees as one of national survival, Congress has included among its sweeping measures provisions to insure that the kinds and quantities of materials required shall be continuously available. It has stated its intention to "prevent inflation. [through a system of economic controls] * * *; to prevent economic disturbances, labor disputes, interferences with the effective mobilization of national resources, and impairment of national unity and morale * * *." ⁴¹ Determined to resist aggression with every necessary resource, Congress has legislated to give the President powers "to promote the national defense, by meeting, promptly and effectively, the requirements of military programs in support of our national security and foreign policy objectives * * *." ⁴² And Congress, far from expressing aversion to drastic interferences with private property in the interest of national defense, has prescribed procedures for requisitioning and condemnation of

⁴¹ Defense Production Act of 1950, Pub. L. 774, 81st Cong., 2d Sess., Sec. 401.

⁴² *Id.*, Sec. 2.

materials, equipment, and facilities which are vital and would otherwise be unavailable.⁴³

We think the President's mandate from Congress is clear. An interruption or diminution in steel production means irremediable injury to the national defense, which the President has been solemnly charged to insure. It is true, as the steel companies have argued, that no statute specifically prescribes the action the President found necessary in this case to maintain steel production. Cf. pp. 57 ff., *supra*. But it has never been supposed that the limits of the President's duties are marked by the literal terms of statutes. See *In re Neagle*, 135 U. S. 1, 64-66. Judge Pine, in the district court, conceded that the President could dispatch troops and use all the force at the Nation's disposal to protect the mails (R. 83-84). See *In re Debs*, 158 U. S. 564, 582. In the present case, we submit, there was no less clear an implication of power to seize the steel companies from an array of statutes and treaties which commit the Nation by law to a program of self-preservation which could not fail to suffer from a loss of steel production. As Attorney General Jackson said of a situation substantially

⁴³ *Id.*, Title II, as amended by Pub. L. 96, 82d Cong., 1st Sess., Sec. 102; Selective Service Act of 1948, c. 625, Sec. 18, 62 Stat. 604, 625.

identical with the one presented here (89 Cong. Rec. 3992):⁴⁴

The Constitution lays upon the President the duty "to take care that the laws be faithfully executed." Among the laws which he is required to find means to execute are those which direct him to equip an enlarged army, to provide for a strengthened navy, to protect Government property, to protect those who are engaged in carrying out the business of the Government, and to carry out the provisions of the Lend-Lease Act. For the faithful execution of such laws the President has back of him not only each general law-enforcement power conferred by the various acts of Congress but the aggregate of all such laws plus that wide discretion as to method vested in him by the Constitution for the purpose of executing the laws.

The Constitution also places on the President the responsibility and vests in him the powers of Commander in Chief of the Army and of the Navy. These weapons for the protection of the continued existence of the Nation are placed in his sole command and the implication is clear that he should not allow them to become paralyzed by failure to obtain supplies for which Congress has appropriated the

⁴⁴This statement was made at the time of the seizure of North American Aviation Company in 1941, because of a strike impeding defense production:

money and which it has directed the President to obtain.

It bears emphasis that, in the period of over a month since the Presidential action the steel companies attack, Congress has done nothing to repudiate or countermand that action. The President has made clear his readiness to accept and execute any Congressional revision of his judgment as to the necessary and appropriate means of dealing with the emergency in the steel industry. In the absence of such revision, we believe that the authority the President has invoked under the Constitution and laws is clearly valid. Intimately conversant with the necessities of the Nation's security, charged by the Constitution and Congressional enactment with the duty to meet those necessities, the President has seized the steel mills because he concluded that this was the only effective way to keep them operating. In the circumstances, with the great need for continuous steel production undisputed, his action was sustained by the extensive system of laws, both statutes and treaties, protecting and providing for the national security at this critical time.

III

THE LABOR MANAGEMENT RELATIONS ACT DID NOT PRECLUDE THE PRESIDENT'S EMERGENCY ACTION IN THIS CASE

Plaintiffs argue that, when they rejected the

zation Board to be fair and consistent with the stabilization program (and accepted by the union), the President should have convened a board of inquiry under Section 206 of the Labor Management Relations Act (61 Stat. 136, 155, 29 U. S. C., Supp. IV, 176) with a view toward ultimately seeking an injunction under Section 208 of that Act to bar a strike for another 80 days. Because this procedure was not followed, the companies contend, the President's temporary taking of the steel mills was unconstitutional.

This argument ignores the facts that (1) the substance, if not the precise forms, of the Labor Management Relations Act was more than achieved by the President and the parties to the labor dispute during the 99-day strike postponement; (2) the situation, when the President found it necessary to take the action here questioned, was such that the procedures of the Labor Management Relations Act would have been inadequate to prevent the cessation of steel production which it was necessary to prevent without the slightest delay; and (3) the patent unfairness of seeking to enjoin the union for another 80 days after it had voluntarily refrained from striking for 99 days would have written finis to the effectiveness of the Government's measures for enlisting the willing cooperation of labor and management in the settlement of labor disputes affecting defense production. . And these measures, evolved under a Congressional mandate to provide "effec-

tive procedures for the settlement of labor disputes affecting national defense" (Defense Production Act of 1950, Sec. 501, Pub. L. 774, 81st Cong., 2d Sess.); are neither less important than, nor inconsistent with, the provisions of the Labor Management Relations Act.

At the most, plaintiffs' argument goes only to the wisdom of the President's "selection of the means for resisting" the threatened danger. On such an issue "it is not for any court to sit in review of the wisdom" of his action. *Hirabayashi v. United States*, 320 U. S. 81, 93. "The Constitution * * * does not demand * * * the impracticable" (*Yakus v. United States*, 321 U. S. 414, 424). The availability of an alternative which would have been far less effective cannot, without more, be taken to preclude the President from exercising his constitutional powers.

In any event, even if the wisdom of the President's choice were open here, there would be no ground for the companies' reliance upon the Labor Management Relations Act. For it is clear, and decisive of the argument under consideration, that the Labor Management Relations Act nowhere precluded the President's taking of the steel mills and that, far from insisting on that Act as the exclusive means for dealing with labor-management controversies, Congress in later legislation expressly stated its intention that other measures be devised for coping with the special problem of

threatened work stoppages affecting defense production.

A. THE PRESIDENT WAS NOT REQUIRED TO USE THE PROCEDURES OF THE LABOR MANAGEMENT RELATIONS ACT

1. Even considered by itself, the Labor Management Relations Act was plainly not intended to be either an exclusive or a mandatory means of dealing with labor disputes threatening a national emergency. Thus, Section 206 of that Act (29 U. S. C., Supp. IV, 176) provides that when in the President's opinion "a threatened or actual strike or lockout * * * will, if permitted to occur or continue, imperil the national health or safety, he *may* appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe" (emphasis added). Similarly, Section 208 (29 U. S. C., Supp. IV, 178) provides that upon "receiving a report from a board of inquiry the President *may* direct the Attorney General" to seek an injunction (emphasis added). The legislative history of these provisions, revealing an express rejection of proposals which would have made the board-of-inquiry and injunction procedures mandatory, makes it clear beyond doubt that the decision as to when or whether

such measures were to be invoked was committed to the President's discretion.⁴⁵

Of even greater present significance is the fact that, in the years since enactment of the Labor Management Relations Act, Congress, in facing the special and acute problems posed by national defense needs, has explicitly directed the President to devise additional means of coping with labor disputes affecting defense production. Title V, Section 501 of the Defense Production Act of 1950 (64 Stat. 812, 50 U. S. C. App. (Supp. IV) Sec. 2121) provides:⁴⁶

It is the intent of Congress, in order to provide for effective price and wage stabilization pursuant to title IV of this Act and *to maintain uninterrupted production*, that there be *effective procedures* for the settlement of labor disputes affecting national defense. [Emphasis added.]

⁴⁵ The House version of the bill which became the Labor Management Relations Act was phrased in mandatory terms ("the President shall direct the Attorney General to" seek an injunction—H. R. 3020, 80th Cong., 1st Sess., Sec. 203 (a), as reported in H. Rep. No. 245). The Senate version, which gave the powers to the Attorney General rather than to the President, used the word "may" (S. 1126, 80th Cong., 1st Sess., Secs. 206, 208, as reported in S. Rep. No. 105), the permissive significance of which was noted in the Senate debates. 93 Cong. Rec. 4594, 5012, 5115. In conference, the House provision for action by the President rather than the Attorney General and the Senate's permissive language were adopted, and the bill was thus enacted: H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 63-65.

⁴⁶ Section 501 was continued unchanged when the Act of July 31, 1951 (Pub. L. 96, 82d Cong., 1st Sess.) amended the Defense Production Act in various respects.

Section 503 of the same Act⁴⁷ goes on to declare that—

* * * No action inconsistent with the provisions of * * * the Labor Management Relations Act, 1947, * * * or with other applicable laws shall be taken under this title.

As we show below (pp. 160–165), the procedure the President followed in this case was in no meaningful sense “inconsistent” with the provisions of the Labor Management Relations Act. What we would emphasize here is the unmistakable fact that, in calling for “effective procedures for the settlement of labor disputes”, and in providing for action not “inconsistent” with the Labor Management Relations Act, Congress anticipated and intended the use of methods “other than” those created by that Act.

The need for such additional and supplemental methods was clear. Geared to a peacetime economy, framed at a time when relaxation of recent wartime controls was the order of the day, the Labor Management Relations Act was not designed to deal fully with the problems of labor relations posed by the special circumstances of a huge new defense effort and of an integrated stabilization program designed to prevent infla-

⁴⁷ As amended in a presently immaterial respect by Section 105 (c) of Pub. L. 96, 82d Cong., 1st Sess.

tion. And so Title V of the Defense Production Act was enacted

to strengthen the national defense effort by giving the President the necessary authority to prevent interruption of production by labor disputes which affect the national defense. In an emergency period we can ill afford to permit labor disputes to follow their normal course to eventual settlement. The institution of price and wage stabilization provided for under title IV of this bill would add to the strain upon normal collective bargaining. We therefore need a peaceful means of settling labor disputes which may threaten national defense or economic stabilization. [S. Rep. No. 2250, 81st Cong., 2d Sess., pp. 40-41.]

The Senate Committee reporting the provisions which became Title V contemplated

that the President, in taking action in a labor dispute affecting national defense will have available to him the procedures provided by existing statutes, *as well as those authorized by this title*. For instance, if a dispute came within the terms of the national emergency provisions of the Labor-Management Relations Act, action *might* be taken under that act. [*Id.* at 41-42, emphasis added.]

But, once again, there was no thought that the President *must* use the Labor Management Relations Act provisions and no others.

2. Title V of the Defense Production Act was broad enough to authorize the President, after consultation with labor and management, to create a body like the War Labor Board of World War II—with power to decide disputes and nonjudicial sanctions for enforcement of its decisions. S. Rep. 2250, 81st Cong., 2d Sess., p. 41; S. Rep. 1037, 82d Cong., 1st Sess., pp. 4, 5-6.

Under Executive Order 10233 (16 F. R. 3503), the President has taken the moderate course of assigning to the Wage Stabilization Board authority to hear labor disputes affecting national defense where (a) the parties voluntarily submit them or (b) the President, regarding a dispute as a substantial threat to the progress of national defense, refers it to the Board. After investigation and inquiry, the Board is to make "recommendations to the parties as to fair and equitable terms of settlement" which are binding only where the parties have agreed that they should be. Where, as in the present case, the dispute is one referred to it by the President, the Board reports to him the results of its inquiry and its recommendations.

Within a month after this disputes procedure was placed in operation, a subcommittee of the House Committee on Education and Labor considered in hearings preparatory to possible amendments of the Defense Pro-

duction Act.⁴⁹ Similar hearings by a subcommittee of the Senate Committee on Labor and Public Welfare led to a report approving the machinery the President had established. S. Rep. No. 1037, 82nd Cong., 1st Sess. When it came to act on the extension of the Defense Production Act, Congress was thus fully apprised of the fact that the Wage Stabilization Board had been armed "with power to make recommendations for the settlement of labor disputes under specified conditions * * *". H. Rep. No. 639, 82nd Cong., 1st Sess., p. 17. With this fact clearly before it, Congress acted on the recommendations of both committees considering the extension bills,⁵⁰ and extended the Defense Production Act of 1950 with no change affecting the disputes functions of the Wage Stabilization Board.⁵¹ Bills designed specifically to eliminate these functions were defeated.⁵²

These briefly summarized developments leave no doubt that the re-enactment without change of Title V of the Defense Production Act must be viewed as specifically approving the disputes procedures the President invoked in this case. Cf. *United States v. South Buffalo R. Co.*, 333 U. S.

⁴⁹ Hearings before a Subcommittee of H. R. Committee on Education and Labor on Disputes Functions of the Wage Stabilization Board, 82nd Cong., 1st Sess.

⁵⁰ S. Rep. No. 470, 82nd Cong., 1st Sess., p. 15; H. Rep. No. 639, 82nd Cong., 1st Sess., pp. 29, 41.

⁵¹ Pub. L. 96, 82nd Cong., 1st Sess.

⁵² 97 Cong. Rec. 8390-8415.

771, 775-783. Congress was clearly persuaded by the view of its spokesmen who concluded that "Executive Order No. 10233 does not in any way run counter to the Defense Production Act or the Taft-Hartley Act." S. Rep. No. 1037, 82nd Cong., 1st sess., p. 10. Fully aware that the Defense Production Act "was designed to be broad and flexible enough to give the President the powers necessary to adapt the complex and intricate economy of the country to the demands of the heavy defense program" (H. Rep. No. 639, 82nd Cong., 1st sess., p. 15), Congress deliberately rejected proposals designed to prevent the President from choosing among complementary alternatives in dealing with the particular facts of particular labor disputes.

The President thus had the full consent of Congress when he referred to the Wage Stabilization Board disputes to which the emergency provisions of the Labor Management Relations Act were literally applicable. As the matter was put by a subcommittee of the Senate Committee on Labor and Public Welfare, reporting on its study of the disputes functions assigned by Executive Order 10233 to the Wage Stabilization Board (S. Rep. No. 1037, 82nd Cong., 1st Sess., p. 4):

It is conceivable that the same dispute will meet the requirements of the emergency disputes provisions of both the Taft-Hartley law and of the Executive Order.

[Should such a situation] arise, the President is the initiating factor in both procedures, *and he will have the responsibility for deciding which route will dispose of the dispute most effectively*—or he *may* use both routes depending upon the circumstances. [Emphasis added.]

Against this background, we think it clear that in the 99 days between December 31, 1951, and the seizure on April 8, 1952, the President acted properly in exhausting a wholly sufficient alternative to the procedures under the Labor Management Relations Act.

3. By referring the dispute to the Wage Stabilization Board on December 22, 1951, the President achieved everything that he could have achieved under the Labor Management Relations Act. In addition, he invoked a procedure designed to ensure that any resolution of the wage dispute was geared to the overall requirements of the stabilization program.

It is undisputed that the union, having failed to reach an agreement with the companies, was prepared to strike on December 31, 1951 (R. 59). On this date, or in advance thereof, the President might have convened a board of inquiry under Section 206 of the Labor Management Relations Act. Upon receipt of the board's report, the President might have directed the Attorney General to seek a court order enjoining the strike. Section 208. This order would have been effective.

tive for a maximum of 80 days. Sections 209 (b) and 210.

This compulsory 80-day postponement of a strike or lockout is the heart of the benefit sought by the Act. During this period, the Act (Section 209 (a)) directs the parties, with the assistance of the Federal Mediation and Conciliation Service, "to make every effort to adjust and settle their differences * * *." Addressing himself to these provisions, Senator Taft said (93 Cong. Rec. 4262) :

The second part of that title provides that if mediation is not successful and a strike occurs in a Nation-wide industry, an injunction may be obtained for 60 days—for what purpose? In order to permit the Mediation Service to make further efforts to obtain a collective bargaining agreement between the employers and the employees.

It was contemplated that the period of delay would in most instances be sufficient to bring about a settlement through continued bargaining under the pressure of public opinion. See S. Rept. No. 105, 80th Cong., 1st Sess., p. 15. The 80 days would also provide time, in the event conciliation and bargaining failed, for consideration and formulation of special emergency action by Congress. See 93 Cong. Rec. 3836 (Senator Taft). As far as the Act itself was concerned, however, the parties would be free after 80 days to engage

in a strike or lockout. The conclusion of this postponement, important and efficacious as it might be in some cases, would mark the exhaustion of the Act's utility.

The significant fact here is that a delay longer than 80 days, coupled with the employment of settlement efforts which the President reasonably deemed more appropriate and more promising than those contemplated by the Labor-Management Relations Act, was achieved in this case. Called upon by the President to remain at work and strive for a settlement without an interruption of production, the union postponed its strike scheduled for December 31, 1951, four times—ultimately through April 8, 1952—a total of 99 days (R. 59-60). And these postponements, just like the 80-day delay provided by the Labor Management Relations Act, constituted an essential feature of the procedure the President employed. The simple reality, known to both the companies and the union, was that the inquiry, report, and recommendations of the Wage Stabilization Board were being used as an alternative to the inquiry and report, without recommendations, of a board under the Labor Management Relations Act—an alternative rendered appropriate by the fact that a “unified labor policy for the emergency makes it desirable that the disputes function be administered by the Wage Stabilization Board and not by a separate agency.” S. Rep. No. 1037, 82nd Cong., 1st Sess., p. 10. The parties knew that an

injunction against a strike was available under the Labor Management Relations Act, that the Wage Stabilization Board would probably not consider their dispute if a strike were called, and that the President's demand for continued production, backed by his powers of compulsion under the Labor Management Relations Act, was not lightly to be unheeded or ignored.

These thoroughly understood realities had been illustrated by events shortly preceding those involved here.⁵³ On August 27, 1951, widespread strikes of workers in the nonferrous metals industry were called. The President referred the disputes to the Wage Stabilization Board for settlement efforts similar to those employed in the instant case. Despite the declaration by the Wage Stabilization Board that it would not consider the disputes unless work was resumed, the strikes continued. On August 29, 1951, the Board referred the disputes back to the President with no report or recommendations, pointing out in its letter that, as it understood its responsibilities under Executive Order 10233, "it would not be appropriate for it to consider the merits of the dispute prior to the resumption of work." Accordingly, on the following day, the President created a board of inquiry under the Labor

⁵³ The account which follows of the nonferrous metals industry dispute is taken from the President's report to Congress contained in H. Doc. No. 354, 82nd Cong., 2d Sess., February 14, 1952.

Management Relations Act, and on September 5, 1951, following receipt of the Board's report by the President, the Attorney General obtained an order enjoining the strikes pursuant to Section 208 of that Act.

In the present case, the occasion for such an injunction was obviated by the union's voluntary postponement of its strike for more than the 80-day injunction period of the Labor Management Relations Act. The substance of that Act's objectives has been more than achieved. Collective bargaining, mediation, and the recommendations of a board responsible for adapting particular labor arrangements to the broad needs of an economy controlled for a huge defense effort and stabilized to prevent inflation, have all been tried at length in an effort to reach a settlement. Subject of newspaper headlines for weeks, the steel dispute has been discussed repeatedly in Congress, both before and since the seizure,⁵⁴ and that body has had ample time to consider whatever action it might choose to take. The President, driven finally to a temporary taking of the steel mills in order to prevent the unquestioned crisis which a cessation of steel production would entail, has made it clear that he is fully prepared to execute any action Congress may direct. See communications to the President of the Senate, cited *supra*,

⁵⁴ See, e. g., 98 Cong. Rec. (unbound) 3225-26, 3418-19, 3461, and pp. 18-22, *supra*.

pp. 19-20 (dated April 9 and April 21, 1952). To date, Congress has not acted.

In determining whether to use the Labor Management Relations Act procedure, instead of the Wage Stabilization Board, the President was compelled to take into consideration the fact that, since January 1, 1952 (when the old contract was no longer in effect), the probabilities were that, until a board under the Labor Management Relations Act could report, a crippling strike would have been in existence, and, after the expiration of the 80-day period of the injunction, the President, the public and the parties to the dispute would have been back where they started. Based on what actually happened, if the President had used the Labor Management Relations Act at the outset, the seizure would have taken place 19 days earlier than it did.

4. Now, having rejected the Wage Stabilization Board recommendations which the union was prepared to accept, and having failed to achieve a settlement through collective bargaining both before and after Government seizure, the last meeting being held in the White House on request by the President, the companies contend that the President was and is required to create a new board to find the facts again; and that an attempt should have been or should be made to compel the union by injunction to remain at work with unchanged terms for another 80 days. In substance, this contention, so patently devoid of

equity, amounts to a claim that the companies are entitled to have their employees compelled to work for a total of six months with unsatisfied demands for changes in their terms of employment. But such compulsion was not contemplated by the Labor Management Relations Act and was plainly inappropriate to the circumstances of this case.

Not only would invocation of the Labor Management Relations Act have been inequitable, but there is no reason to suppose that it would have prevented an interruption of steel production. Under the Labor Management Relations Act, an injunction may be sought only after a board of inquiry has investigated and reported to the President. With the complex facts of the present dispute, which occupied the Wage Stabilization Board for three months, there was no assurance that a report reflecting in any way the impartial study contemplated by the Act could have been prepared within any reasonably short space of time. Unless the report was to be an empty formality, there was danger that a strike during its preparation would cost precious and irreplaceable steel tonnage. And if it be suggested that the facts had already been found and needed no further study, this is merely another way of saying that the ends of the Labor Management Relations Act had already been fulfilled. Summarizing these considerations, the President

declared (Letter to the President of the Senate, 98 Cong. Rec. (unbound) 4192, April 21, 1952):

It appears to me that another fact-finding board and more delays would be futile. There is nothing in the situation to suggest that further fact finding and further delay would bring about a settlement. And it is by no means certain that the Taft-Hartley procedures would actually prevent a shut-down.

In the circumstances of this case, it is at least highly questionable whether a court of equity would be prepared to enjoin the union from striking after the voluntary 99-day postponement. In *Hecht Co. v. Bowles*, 321 U. S. 321, where the statute provided that upon an administrative official's showing of certain facts "a permanent or temporary injunction, restraining order, or other order shall be granted without bond", this Court rejected the contention that injunctive relief was mandatory despite Congress' use of the word "shall." Section 208 of the Labor Management Relations Act, merely providing that the district courts "shall have jurisdiction" to issue injunctions or other orders, falls far shorter of the "unequivocal statement" of Congressional purpose which would be required to establish that the courts were placed under an "absolute duty" to issue injunctions "under any and all circumstances." *Hecht Co. v. Bowles*, *supra*, at 329.

But apart from the legal situation which might exist if the President had deemed the Labor Management Relations Act procedure appropriate and permissible, we submit the President's judgment that this procedure was futile, unfair, and improper was clearly a reasonable one.

In addition to the considerations of fairness which might move a court of equity, and which the President was certainly not required to disregard, is the practical fact that an effort to secure an injunction in this case would probably have ended the effectiveness of the disputes functions the President had assigned to the Wage Stabilization Board in cases involving national emergencies. These functions are exercised, and can be effective, only where the parties voluntarily continue production. Such voluntary restraint is promoted by the likelihood that an injunction will be used as an alternative. It is extremely unlikely that the "voluntary" method would ever be acceptable again if the alternatives turned out to be cumulative.

5 Charged with responsibility to weigh the considerations we have summarized, the President, after the union had voluntarily accepted restraints greater than those of the Labor Management Relations Act, could reasonably adopt the view that the invocation of that Act would have been an unjustified repudiation of the assumption on which the union had voluntarily refrained from striking,

and would not have been effective to insure the uninterrupted steel production which was and is so critically important. These wholly reasonable conclusions dispose of the contention that there was really no emergency because a Labor Management Relations Act injunction was not sought. The emergency in hard fact was the threatened stoppage of steel production. The President could properly conclude that the emergency should no more be cured by attempting to utilize the Labor Management Relations Act than by sacrificing the stabilization program to the price demands of the companies. Cf. pp. 47-49, *supra*. Because his rejection of these alternatives was proper, their existence is no basis for attack on the legality of the taking of the steel mills.

**B. THE LABOR MANAGEMENT RELATIONS ACT DID NOT PRECLUDE
EXECUTIVE SEIZURE**

In the district court the companies argued that because Congress omitted any seizure provision when it wrote the Labor Management Relations Act, the action of the President in this case was precluded. But this argument, resting on the fallacious premise that Congress passed a law by not passing a law, misreads both the language and history of the Labor Management Relations Act, misconceives the nature of the President's constitutional powers, and ignores the critical history

and legislation that have followed the Labor Management Relations Act.

Apart from the problem of the provision for an injunction delaying a strike or lockout, discussed above (pp. 160-162), there is nothing in the LMRA itself to show that Congress intended to deny the President a power of seizure. Congress recognized that where a dispute was not settled during the period of delay, further action, not specified by the Act, might be required. It is true, as the companies have argued, that Congress foresaw and considered with favor the possibility that it might itself take action to handle a specific emergency. But there was, nevertheless, no suggestion that, in the absence of a settlement during postponement of a strike or lockout and in the absence of action by Congress, seizure by the President was intended to be precluded.

Congress did consider and omit a specific seizure provision. But the announced reasons for this negative action make it clear that it was not intended as an affirmative prescription of seizure. Explaining, Senator Taft said. (93 Cong. Rec. 3835-3836):

We did not feel that we should put into the law, as a part of the collective-bargaining machinery, an ultimate resort to compulsory arbitration, or to seizure, or to any other action. We feel that it would interfere with the whole process of collective bargaining. *If such a remedy is available as a routine remedy*, there will always be pressure to resort to it by whichever

party thinks it will receive better treatment through such a process than it would receive in collective bargaining, and it will back out of collective bargaining. It will not make a bona-fide attempt to settle if it thinks it will receive a better deal under the final arbitration which may be provided. [Emphasis added.]

This explanation makes it clear that what was avoided was a provision for seizure as a routine, expectable device.⁵⁵ Unwilling to hold out hopes of reward to recalcitrant parties who might anticipate benefits from seizure, Congress left for specific consideration in specific cases the course to be followed when delay and conciliation proved insufficient to settle a dispute. And Congress, which knows the delays and difficulties of legislation, certainly did not intend that a prolonged crisis should continue without remedy while a legislative solution was being hammered out.

In any event, what is important at this point is the obvious proposition that the failure of the LMRA to grant specific authority for seizure cannot be read as a prohibition against seizure.

⁵⁵ Under the War Labor Disputes Act of June 25, 1943, 57 Stat. 163, 50 U. S. C. App. 309, seizure was the normal ultimate sanction for enforcement of War Labor Board orders. See I Termination Report of the National War Labor Board, chap. 39, p. 413.

Cf. Helvering v. Clifford, 309 U. S. 331, 337.⁵⁰ We have shown above (pp. 112-120) that Congress has repeatedly recognized the President's power of seizure in an emergency, with or without specific statutory authority. Nothing in the language or history of the LMRA purports to restrict Presidential power stemming from sources outside that Act. We do not argue that the LMRA is itself authority for the President's action; for this authority we have invoked the Constitution and a large body of other laws as they apply to the urgent circumstances of this case. *Supra*, Point II. Here we urge simply that, if the authority upon which we rely is otherwise ample, as we think it clearly is, it is in no way diminished by the failure of the Labor Management Relations Act to supply additional authority.

CONCLUSION

One of the great problems of the age is whether the democracies can find sufficient vigor and energy to respond promptly and decisively to the crises of our time. The century and a half since the drafting of the Constitution has witnessed an extraordinary growth in the magnitude, com-

⁵⁰ "There are vast differences between legislating by doing nothing and legislating by positive enactment, both in the processes by which the will of Congress is derived and stated and in the clarity and certainty of the expression of its will." Mr. Justice Rutledge, concurring in *Cleveland v. United States*, 329 U. S. 14, 22.

plexity, and interrelationship of the nation's problems. There has been an enormous increase in the tempo at which events occur, and decisions must be made. And above all there is the necessity with which the democracies are faced, if they are to maintain their very existence, to meet and overcome the challenge of dictatorship whether on the field of battle or in the market places of the world, where goods and ideas are traded.

We believe that these problems, like other problems which have arisen in the past, can be met within the framework of our Constitution. But they can be met only by regarding the Constitution as a "continuously operative charter of government" (*Yakus v. United States*, 321 U. S. 414, 424), which is capable now as in the past of adapting itself to the needs of new circumstances without sacrificing the basic principles of democracy and liberty. This Court has recently emphasized that "it is of the highest importance that the fundamental purposes of the Constitution be kept in mind and given effect" and that "in time of crisis nothing could be more tragic and less expressive of the intent of the people than so to construe their Constitution that by its own terms it would substantially hinder rather than help them in defending their national safety." *Lichter v. United States*, 334 U. S. 742, 779-780. As was said by Chief Justice Hughes, "We have a fighting Constitution" which "marches" with events.

"There are constantly new applications of unchanged powers, and it is ascertained that in novel and complex situations, the old grants contained, in their general words and true significance, needed and adequate authority." Charles E. Hughes, *War Powers under the Constitution*, 42 A. B. A. Rep. 232, 247-8. "Equally, in war and in peace" the particular provisions of the Constitution "must be read with the realistic purposes of the entire instrument fully in mind." *Lichter v. United States*, *supra*, 782.

The present case does not require this Court to "fix the outermost line" (*Steward Machine Co. v. Davis*, 301 U. S. 548, 591). As we have sought to show, the issue before this Court is whether, in dealing with an immediate crisis gravely threatening the continuance of the production of perhaps the most essential commodity of our present civilization, the President could take temporary action, of a type not prohibited by either the Constitution or the statutes, to avert the imminent threat, while recognizing fully the power of Congress by appropriate legislation to undo what he has done or to prescribe farther or different steps. We believe that the solution does not require the pressing of juristic principles to "abstract extremes" (*New York v. United States*, 326 U. S. 572, 577), but only a realistic consideration of the "necessities of the situation" (*Moyer v. Peabody*, 212 U. S. 78, 84).

For the reasons set forth above, we submit that the orders of the district court must be set aside. We have demonstrated the non-constitutional grounds which, we believe, compel reversal. When the constitutional question is reached, there is ample authority to sustain the President's action.

Final disposition of this case on either of these grounds will open the way for continued steel production and eliminate the occasion for further interruptions.

Respectfully submitted.

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CHARLES ELMORE CROPLEY
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1951

THE YOUNGSTOWN SHEET AND TUBE COMPANY, ET AL.,
Petitioners,

v.

CHARLES SAWYER

CHARLES SAWYER, SECRETARY OF COMMERCE, *Petitioner,*

v.

THE YOUNGSTOWN SHEET AND TUBE CO., ET AL.

On Writs of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

**BRIEF FOR BROTHERHOOD OF LOCOMOTIVE ENGI-
NEERS, BROTHERHOOD OF LOCOMOTIVE FIRE-
MEN AND ENGINEMEN AND ORDER OF RAIL-
WAY CONDUCTORS AS AMICI CURIAE**

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INDEX.

	Page
OPINIONS BELOW	2
QUESTIONS INVOLVED	2
CONSTITUTIONAL PROVISIONS, STATUTES AND EXECUTIVE ORDERS INVOLVED	3
STATEMENT	3
1. The events leading to the seizures	3
2. The powers relied upon by the President as au- thorizing the seizures	9
3. The nature of the seizures	11
4. The effect of the seizure upon collective bar- gaining	19
5. The extent to which the emergency procedures of the Labor Management Relations Act and the Railway Labor Act were exhausted before or after seizure	22
SUMMARY OF ARGUMENT	23
ARGUMENT	
Relationship of issues in Cases Nos. 744 and 745 to issues in Case No. 759	27
I. The President has no power under the Constitu- tion of the United States to seize private property in the absence of a valid Congressional enact- ment authorizing the seizure	35
II. The President has no power to seize private prop- erty in connection with a labor dispute when Congress has provided in the Labor Management Relations Act and the Railway Labor Act for retention of collective bargaining during national emergencies, subject to a cooling off period, and rejected proposals for seizure—and other bars to economic self-help—as inconsistent with col- lective bargaining	42
CONCLUSION	58

	Page
Appendix A: Pertinent Provisions of the Constitution of the United States	61
Appendix B: Pertinent Provisions of the Labor Management Relations Act, 1947 (29 U.S.C., 141, <i>et seq.</i>)	64
Appendix C: Pertinent Provisions of the Railway Labor Act (45 U.S.C. 151, <i>et seq.</i>)	70
Appendix D: Executive Order No. 10340	73
Appendix E: Executive Order No. 10141	76
Appendix F: Executive Order No. 10155	79

CITATIONS.

CASES:

Aldridge v. Tusumbia, <i>etc.</i> R.R. Co., 2 Stew. & Port. 199 (Alabama, 1832)	38
Anderson v. Chesapeake Ferry Co., 186 Va. 481, 45 S.E. 2d 10	34
Automobile Workers v. O'Brien, 339 U.S. 454	50, 51
Brookville v. Metamora Hydraulic Co., 91 Ind. 134 (1883)	38
Burt v. Merchants Ins. Co., 106 Mass. 356 (1871)	37
Bus Employees v. Wisconsin Board, 340 U.S. 383 ..	49
J. I. Gase v. NLRB, 321 U.S. 332	51
Dorchy v. Kansas, 272 U. S. 306 (1926)	30
Gilmer v. Lime Point, 18 Cal. 229 (1861)	37
H. J. Heinz Co. v. NLRB, 311 U.S. 514, 523-526	51
Hoe v. United States, 218 U.S. 322 (1910)	25, 38
Kohl v. United States, 91 U.S. 367 (1875)	24, 38
Londor v. Denver 52 Colo. 15 (1912)	38
Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 ..	51
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 ..	51, 56
Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342	50, 51
Parham v. Justices, <i>etc.</i> , Decatur County, 9 Ga. 341 (1851)	38
Reddall v. Bryan, 14 Md. 444 (1859)	37
San Joaquin Irrigation Co. v. Stevenson, 164 Cal. 221 (1912)	38

Index Continued.

iii

	Page
Sesson v. Supervisors, 128 Ia. 442 (1905)	38
Sholl v. German Coal Co., 118 Ill. 427 (1887)	38
Toledo, Peoria & Western R.R. Co. v. Stover, 60 F. Supp. 587 (D.C.S.D. Ill.)	19, 39
United States, Matter of Petition of 96 N.Y. 227 (1884)	37
United States v. Brotherhood of Locomotive Engineers, 79 F. Supp. 485 (D.C.), dismissed as moot, 174 F. 2d 160 (C.A.D.C.), certiorari denied, 335 U.S. 867, 338 U.S. 872	19
United States v. Brotherhood of Railroad Trainmen, 96 F. Supp. 428 (D.C.N.D. Ill., E.D.)	19
United States v. Brotherhood of Railroad Trainmen, 95 F. Supp. 1019 (D.C.D.C.)	19
United States v. Brotherhood of Railroad Trainmen, 27 L.R.R.M. 2151 (D.C.N.D. Ill. E.D.)	19
United States v. Certain Tract of Land, 70 Fed. 940 942 (E.D. Pa. 1894)	38
United States v. Gettysburg Electric Railway Co., 160 U.S. 668	39
United States v. Montgomery Ward & Co., 58 F. Supp. 408 (D.C., N.D. Ill. E.D.); certiorari denied, 324 U.S. 858 reversed on other grounds, 150 F. 2d 369 (CA 7), vacated as moot, 326 U.S. 690	38
United States v. North American Co., 253 U.S. 330 ..	38
United States v. Pacific Railroad Co., 120 U.S. 227 ..	41
United States v. Raders, 70 Fed. 748 (S.D. Ga., 1895) ..	38
United States v. Russell, 13 Wall 623	40
United States v. Switchmen's Union of North America, 97 F. Supp. 97 (D.C.W.D. N.Y., 1950) ..	4, 19
United States-Scott v. Toledo, 36 F. 385, CAA 688 ..	35
Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515, 548-549, 553-557	51, 55, 56
Wall, Ex parte, 107 U.S. 265 (1882)	30
Wilson v. New, 243 U.S. 332 (1917)	41

CONSTITUTION AND STATUTES:

Constitution of the United States:

Article I	61
Section 1	61
Section 8	61

	Page
Article II	62
Section 1	62
Article IV	62
Article VI	62
Fourth Amendment	62
Fifth Amendment	24, 34, 63
Ninth Amendment	63
Tenth Amendment	63
Thirteenth Amendment	34, 63
Act of August 29, 1916 (39 Stat. 619, 645)	10
Act of September 3, 1916 (39 Stat. 721, 436)	41
Gettysburg Appropriations Act	39
Labor Management Relations Act of 1947, 29 USC 141, et seq.	
Title I	64
Section 101	64
Section 206	46, 47, 48, 66
Section 207 (a)	47, 67
207 (b)	67
207 (c)	67
Section 208 (a) (i) (ii)	47, 67
208 (b)	68
208 (c)	68
Section 209 (a)	68
209 (b)	48, 68
Section 210	48, 68
Section 212	69
National Labor Relations Act (29 U.S.C.A. 158(5))	64
Section 1	64
Section 2	65
Section 7	65
Section 8 (a) (5)	66
8 (b) (3)	66
8 (d)	66
Section 13	66
Railway Labor Act, 45 U.S.C. 151 et seq.	
Section 2, First	70
2, Fourth	70
Section 5, First (a)	70
5, First (b)	70

Index Continued.

v

	Page
Section 6	71
Section 10	43, 71
Railway Labor Act, 45 U.S.C.A. 152(4) 1934 Amend- ment, Sec. 2, para. 4	50, 70
CONGRESSIONAL MATERIAL: 1	
53 Cong. Rec.: 13335-13337	41
58 Cong. Rec.: 8315	45
8480	45
8483	45
8519	45
8690	45
59 Cong. Rec.: 146	45
3260	45
3262	45
3270	45
67 Cong. Rec.: 4511	41
4512	41
4513	45
4517	45
4521	41
4524	44
4588	45
4662-4664	43
4702	46
4703	46
4705	46
4721	46
4723	46
4727	43
78 Cong. Rec.: 11717	55
11720	55

	Page
93 Cong. Rec.:	
3512	48
3637	48
3645	48
3835	48
6295	48
6386	42
A1107	48
Hearings before Committee in Interstate and Foreign Commerce, U.S. House of Representatives, 69th Cong., 1st Sess. on H.R. 4729, p. 270.....	43
Hearings before the Committee on Interstate and Foreign Commerce, House, 69th Cong., 1st Sess., on H.R. 7180, p. 100	43, 44
Hearings before Committee on Interstate Commerce, U.S. Senate, 69th Cong., 1st Sess., on S. 2306, p. 14.	43
Hearings before the Senate Committee on Labor and Public Welfare on the Taft-Hartley bill, S. 1126, 80th Cong., 1st Sess., pp. 940, 950	54
H.R. 10453, 66th Cong., 1st Sess.	46
Joint Resolution, June 5, 1894	39
MISCELLANEOUS:	
Ann. Cas. 1918 E. 41	39
American Jurisprudence, Vol. 18, p. 637, Eminent Domain, Sec. 9	39
Blackstone, I Commentaries (Lewis, 1900), pp. 139-140	24, 36, 38
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Commons, Institutional Economics, 1934, p. 854....	53
Commons, Trade Unionism and Labor Problems, 1921, p. 1	52
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Hiller, The Strike, 1928, p. 206	52
Keir, Labor's Search for More, 1937, p. 18	52
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Sec. 1.43	42
Twentieth Century Fund, Labor Committee, Strikes and Democratic Government (1947):	
Page 13	54
Page 14	54
Page 27	33
Pages 30-31	33

IN THE
Supreme Court of the United States

OCTOBER TERM, 1951.

Nos. 744 and 745

THE YOUNGSTOWN SHEET AND TUBE COMPANY, ET AL.,
Petitioners,

v.

CHARLES SAWYER

CHARLES SAWYER, SECRETARY OF COMMERCE, *Petitioner,*

v.

THE YOUNGSTOWN SHEET AND TUBE CO., ET AL.

On Writs of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

**BRIEF FOR BROTHERHOOD OF LOCOMOTIVE ENGI-
NEERS, BROTHERHOOD OF LOCOMOTIVE FIRE-
MEN AND ENGINEMEN AND ORDER OF RAIL-
WAY CONDUCTORS AS AMICI CURIAE**

These cases raise issues as to the constitutional validity of Executive Order No. 10340, by which the President, acting in reliance upon his alleged inherent powers under the Constitution of the United States, seized the steel mills. The Brotherhood of Locomotive Engineers, the Brother-

hood of Locomotive Firemen and Enginemen and the Order of Railway Conductors have pending in this Court a petition for a writ of certiorari in *Brotherhood of Locomotive Firemen and Enginemen, et al. v. United States*, No. 759, this Term, which presents similar issues with respect to Executive Orders Nos. 10141 and 10155, under which the President purported to seize the 197 major railroads of this country. On May 10, 1952, this Court entered an order providing that the Brotherhoods may file briefs *amici* in the instant cases in order to protect any interest which they may have in the issues to be argued herein.

OPINIONS BELOW

The opinion of the District Court in Cases No. 744 and 745, involving the seizure of the steel mills (R. 63-76) is not yet reported. The opinion of the Court of Appeals for the District of Columbia Circuit in these cases (R. 447-449), on consideration of motions for stays, is not yet reported. The opinion of the District Court in Case No. 759, involving the seizure of the railroads is not officially reported but has been unofficially reported in 29 LRRM 2681.

QUESTIONS INVOLVED

The questions considered in this brief are:

1. Whether the President has the power under the Constitution of the United States to seize private property in the absence of a valid congressional enactment authorizing the seizure.

2. Whether the President has the power to seize private property in connection with a labor dispute when Congress has provided in the Labor Management Relations Act and the Railway Labor Act for retention of collective bargaining during national emergencies, subject to a cooling off period, and rejected proposals for seizure—and other bars to economic self-help—as inconsistent with collective bargaining.

CONSTITUTIONAL PROVISIONS, STATUTES AND EXECUTIVE ORDERS INVOLVED

The pertinent provisions of the Constitution of the United States are set forth in Appendix A, *infra*, pp. 61-63. The pertinent provisions of the Labor Management Relations Act, 1947 (29 U. S. C., 141, *et seq.*), are set forth in Appendix B, *infra*, pp. 64-69. The pertinent provisions of the Railway Labor Act (45 U. S. C., 151, *et seq.*), are set forth in Appendix C, *infra*, pp. 70-72. Executive Order No. 10340 seizing the steel mills is set forth in full in Appendix D, *infra*, pp. 73-75. Executive Order No. 10141 seizing the Chicago, Rock Island and Pacific Railroad Company is set forth in full in Appendix E, *infra*, pp. 76-78. Executive Order No. 10155 seizing the other 196 major railroads in the United States is set forth in full in Appendix F, *infra*, pp. 79-82.

STATEMENT

In the following statement we do not include a full statement of facts but only those facts in the instant cases and in Case No. 759 which are relevant to the two questions discussed in this brief.

1. The events leading to the seizures.

The seizure of the railroads, which antedated the seizure of the steel mills, grew out of a bona fide labor dispute arising from the demands of the employees for higher wages, shorter hours and improved working conditions and demands of the carriers for the abrogation of numerous previously existing contractual provisions protecting working standards.

The seizure of the Chicago, Rock Island and Pacific Railroad on July 8, 1950 under Executive Order No. 10141, followed the service of notices by the Switchmen's Union of North America, A. F. L., on the Rock Island on September 24, 1949 requesting a 40 hour work week with 48 hours

pay and other improvements in wages, hours and working conditions for the employees of the Rock Island within the crafts for whom the Switchmen's Union was the bargaining representative.¹ These notices were served under the provisions of the Railway Labor Act. The contract then in existence between the Switchmen's Union and the Rock Island was not for any fixed term but could be reopened at any time upon compliance with the provisions of the Railway Labor Act. The Rock Island in turn served notice on the Switchmen's Union of its demands for changes in rules and working conditions which the employees resisted as detrimental to their standards.

After unsuccessful negotiations and unsuccessful mediation efforts, a strike was called for March 21, 1950. The National Mediation Board thereupon advised the President that this labor dispute threatened substantially to interrupt interstate commerce to a degree which would deprive the country of essential transportation service. The President on March 20, 1950, acting pursuant to Section 10 of the Railway Labor Act, appointed an Emergency Board to investigate the dispute. On April 18, 1950, the Emergency Board made public its report. The Switchmen's Union advised the Rock Island that the recommendations of the Emergency Board were unacceptable to them and requested a conference for the purpose of bargaining further with respect to the issues in dispute. These conferences were also unsuccessful and the Switchmen's Union called a strike on the Chicago, Rock Island and Pacific Railroad to begin on June 25, 1950.

The ensuing strike was limited to a stoppage in the movement of only those trains which did not carry troops

¹ All of the facts herein stated with respect to the Switchmen's Union's dispute with the Chicago Rock Island and Pacific Railroad Company, and the ensuing strike appear either in the opinion in *United States v. Switchmen's Union of North America*, 97 F. Supp. 97 (D. C. W. D. N. Y., 1950) or in the official records of the National Mediation Board with respect to its mediation in that dispute.

or war supplies or materials to be used in the manufacture of war supplies.² In all instances the Switchmen's Union accepted without question the statement of government officials as to the character of the goods which they requested transported and moved all those designated as for use in the manufacture of goods under defense contracts. The existence of strict government rationing of scarce materials made it possible for any manufacturer of parts, although he was not himself under contract to the government, to know that his parts would ultimately be used in the manufacture of articles for the government at some subsequent point in its processing because otherwise he would not have been allotted his materials. Where neither allocated material nor an identifiable government contract at the end of the chain was present, that meant the materials were in sufficient abundance so that any manufacturer could purchase the material on the open market without difficulty. Even as to such materials or supplies the railway union took or was willing to take the government's designation of any material as needed for defense as final and moved the material (No. 759, Tr. 646-647, 942-944).

On July 8, 1950, efforts to settle the strike having been unsuccessful, the President issued Executive Order No. 10141 (Appendix E, *infra*, p. 76), which recited:

Whereas I find that as a result of labor disturbance there are interruptions, and threatened interruptions, of the operations of the transportation system owned

² While the testimony in Case No. 759 was not directed specifically to the Switchmen's strike on the Rock Island, it was clear from the testimony that all of the strikes conducted by the railroad unions since the outbreak of World War II had been intentionally limited to an attempt to impair the carriers' earnings to the extent that could be accomplished without refusing to move any troops or supplies needed by the government either directly for defense or for the manufacture of defense materials (No. 759, Tr. 380-381, 676-677).

or operated by the Chicago, Rock Island & Pacific Railroad Co.; that it has become necessary to take *possession* and assume *control* of the said transportation system for purposes that are needful or desirable in connection with the present emergency; and that the exercise, as hereinafter specified, of the powers vested in me is necessary to insure in the national interest the operation of the said transportation system. (Italics supplied.)

The Chicago, Rock Island and Pacific Railroad has at all times since July 8, 1950 continued to be subject to Executive Order No: 10141 (No. 759, Tr. 50, 55).

The seizure of the other 196 railroads, including all trunk lines and switching railroads in the United States, on August 25, 1950, under Executive Order No. 10155 followed the service of notices by the Order of Railway Conductors and the Brotherhood of Railroad Trainmen acting under the provisions of the Railway Labor Act upon carriers whose employees are represented by those organizations of their desire to negotiate certain changes in rules and working conditions, requesting, among other things, a 40 hour week with 48 hours pay for employees within the crafts they represent (No. 759, Tr. 21, 761-762).

The carriers met the notices served by the Brotherhoods by serving counter notices stating the desires of the carriers to negotiate widespread changes in previously existing rules and working conditions (No. 759, Tr. 659-661, 765-766, 826-827; Affidavit of Eugene C. Thompson, attached to complaint, par. 2).

Conferences having proved unsuccessful the National Mediation Board on February 24, 1950, advised the President that in its judgment this labor dispute threatened a substantial interruption to interstate commerce to a degree which would deprive the country of essential transportation service (No. 759, Tr. 23). The President on February 24, 1950, pursuant to Section 10 of the Railway Labor Act, appointed an Emergency Board to investigate this labor

dispute (No. 759 Tr. 23). On June 15, 1950, the Emergency Board issued its report (No. 759 Tr. 23). On June 20, 1950, the Order of Railway Conductors and the Brotherhood of Railroad Trainmen advised the carriers that the recommendations of the Emergency Board were not acceptable. Further conferences ensued, at which the National Mediation Board attempted unsuccessfully to help the parties to reach an agreement.

On August 23, 1950, the Brotherhood of Railroad Trainmen and the Order of Railway Conductors set a nation-wide strike for August 28, 1950. In order to avert this strike and before the strike began the President of the United States on August 25, 1950, issued Executive Order No. 10155, in which he found, in language almost identical with that used in seizing the Rock Island (*supra*, pp. 5-6), that "it has become necessary to take possession and assume control" of the 196 railroads named in a list attached to the order (See Appendix F, *infra*, p. 79).

The seizure of the steel mills grew out of an analogous situation. On November 1, 1951, the United Steel Workers of America, C. I. O., which had a collective bargaining agreement with the steel companies due to expire on December 31, 1951, gave notice to the steel companies that they wished in a proposed new collective agreement between the parties to effect increases in wages and improvement in working conditions over those established by the old contract (No. 744, R. 3, 81). No progress was made in the negotiations which followed and, on December 22, 1951, the dispute was referred by the President to the Wage Stabilization Board, in accordance with the provisions of Executive Order 10233, 16 F. R. 3503. The Presidential letter of referral, a copy of which is attached to the affidavit of Mr. Harry Weiss, Executive Director of the Wage Stabilization Board, requested the Board to investigate the dispute and promptly to report with recommendations as

to fair and equitable terms of settlement.³ The President noted that the union and the steel producers had made no progress in resolving their differences and that it appeared unlikely that further bargaining or mediation and conciliation would suffice to avoid early and serious production losses in the vital steel industry.

The Wage Stabilization Board, on March 20, 1952, issued a "Report and Recommendations". The Board's recommendations, acceptable to the union, were rejected by steel management (No. 744, R. 81). No progress was made in negotiations between the parties pursuant to the union's notice of November 1, 1951, and a strike was called, as contemplated by the notice, for December 31, 1951. After the President's referral of the dispute to the Wage Stabilization Board on December 22, 1951, the union voluntarily deferred the strike which had previously been set. After management's refusal to accept the Board's recommendations, the strike was called for 12:01 A. M., April 9, 1952 (No. 744, R. 7). So far as appears from the record the steel companies have no contracts with the government for the production of steel. At the oral argument herein when questioned by the Justices, the Solicitor General disclaimed knowledge of any such contracts.

The strike was averted by the Executive Order No. 10340 issued by the President directing the Secretary of Commerce to take possession of the steel industry on the night of April 8, 1952. The union immediately called off the contemplated strike and full-scale production of steel continued without interruption until April 29, 1952 after the issuance of Judge Pine's decision in the District Court.

As in the railroad seizure, so too in the steel seizure, the

³ The Presidential letter of referral, the report of March 13, 1952, by the Steel Panel which heard the presentation of steel wage dispute, and the "Report and Recommendations" of the Wage Stabilization Board of March 20, 1952, all of which are contained in the certified transcript of record in No. 744 as appendices to the affidavit of Mr. Harry Weiss (No. 744, R. 59-61), were omitted in printing the record. Copies of these documents have been assembled and deposited with the Clerk for the Court's use.

Executive Order of seizure referred only to the underlying existing labor dispute as the occasion for the seizure. Thus the order of seizure of the steel mills recites (Appendix D, *infra*, pp. 73-74):

Whereas a controversy has arisen between certain companies in the United States producing and fabricating steel and the elements thereof and certain of their workers represented by the United Steel Workers of America, CIO, regarding terms and conditions of employment; and

Whereas the controversy has not been settled through the processes of collective bargaining or through the efforts of the Government, including those of the Wage Stabilization Board, to which the controversy was referred on December 22, 1951, pursuant to Executive Order No. 10233, and a strike has been called for 12:01 a.m., April 9, 1952; and

Whereas a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field; and

Whereas in order to assure the continued availability of steel and steel products during the existing emergency, is it necessary that the United States take possession of and operate the plants, facilities, and other property of the said companies * * *

1. The Secretary of Commerce is hereby authorized and directed to take possession of all or such of the plants, facilities, and other property of the companies named in the list attached hereto, or any part thereof, as he may deem necessary in the interests of national defense; and to operate or to arrange for the operation thereof and to do all things necessary for, or incidental to, such operation.

2. The powers relied upon by the President as authorizing the seizures

In seizing the railroads the President in his Executive Orders purports to be exercising both the supposed inherent powers conferred upon him by the Constitution and the

powers conferred upon him by the Act of August 29, 1916. Executive Orders Nos. 10141 (Appendix E, *infra*, p. 76), and 10155 (Appendix F, *infra*, p. 79) both state:

Now, therefore, by virtue of the power and authority vested in me, by the Constitution and the laws of the United States, including the Act of August 29, 1916 (39 Stat. 619, 645), as President of the United States and as Commander in Chief of the Armed Forces of the United States, it is hereby ordered as follows:

At the hearing in the district court in the railroad cases, counsel for the government stated that the government was relying primarily on the Act of August 29, 1916, as justifying the seizure but that the government also reserved the right to rely on the inherent powers of the President (No. 759, Tr. 5, 18).⁴

In seizing the steel mills the President in his Executive Order purports to be exercising only his supposed inherent powers under the Constitution. Thus, Executive Order 10340 (Appendix D, *infra*, p. 74) states:

Now, therefore, by virtue of the authority vested in me by the Constitution and laws of the United States, and as President of the United States and Commander

⁴ In the railroad cases the Brotherhoods have attacked the constitutional validity of the Act of August 29, 1916 on the ground that it constitutes an unlawful delegation of legislative power to the President (Answer, Second Defense, Par. 2). We shall not further mention this statute in this brief except to point out that this Court's classification of the powers involved in the seizure may be of crucial importance to the Brotherhoods' position in Case No. 759. If this Court should hold that the Executive Orders here involved constituted an exercise of the power of eminent domain, and that the power of eminent domain is a legislative power, then all the applicable law respecting the inability of Congress to delegate legislative power to the President and respecting the requirements that the legislative exercise of the eminent domain power must include a judgment made by the legislature itself as to the nature of the property to be taken, the procedure to be followed in the taking and the method of compensation, becomes material in judging whether the Act of August 29, 1916 and the executive action pursuant thereto is constitutional.

in Chief of the armed forces of the United States, it is hereby ordered as follows:

3. The nature of the seizures

In each the railroad seizures and the steel seizure the orders of seizure themselves, as well as the conduct of the government in carrying out the seizure, made it clear that the sole purpose of the seizure was to avert a stoppage of production or transportation by a labor dispute. There is no suggestion in the orders themselves or in any acts performed by the government as a result of the seizure that it desired to take either permanently or temporarily any of the property of anyone, except insofar as such a taking might result incidentally from the government's fixing of wages, hours or working conditions for the duration of its seizure.

Executive Orders Nos. 10141 (Appendix E, *infra* p. 76 and 10155 (Appendix F, *infra*, p. 79) seizing the railroads purport to vest possession and control of the railroads in the Secretary of the Army but provide that the Secretary may either operate or arrange for the operation of the railroads (Par. 2) and except as the Secretary may otherwise provide "the boards of directors, trustees, receivers, officers and employees of such carriers shall continue the operation * * * in the usual and ordinary course of business, in the names of the respective companies" (Par. 4). The orders also stated that until the further order of the President or the Secretary the railroads "shall be managed and operated under the terms and conditions of employment in effect" on June 24, 1950 in respect to the Rock Island and on August 20, 1950 in respect to the other roads (Par. 6). The orders indicated an intention that the carriers remain free to make such changes in wages, hours and terms of employment as they and the workers might agree upon (Par. 6).

In accordance with the permissive power vested in the Secretary of the Army either to operate or to arrange for the operation of the railroads, the Secretary of the Army in every instance elected to arrange for the operation of

the roads rather than to operate them himself. Thus on July 10, 1950, two days after the alleged seizure of the Chicago, Rock Island and Pacific Railroad Company, the Army entered into a contract with the Chicago, Rock Island and Pacific Railroad Company entitled "Operating Agreement" (No. 759, Plff's Exh., No. 6), giving the company full operation of the railroad. Within a few days after their respective seizures, the Army entered into a similar "Operating Agreement" (No. 759, Plff's Exh. No. 7) with each of the other 196 carriers here involved, granting each of them the operation of its own road. These agreements specify that the Government is retaining certain limited rights of possession and control, whereas the entire operation is to be in the railroad. As to possession and control, the agreement limits such possession and control in the Army to only that necessary to prevent an interruption of transportation service. Paragraph 2 provides:

The action of the Government in taking *possession* of said properties is not an assertion by the Government of ownership thereof, or any interest therein, it being understood that title to said properties remains in the owners thereof and that, during the period of their *possession and control*, the Government will assert only such rights as are necessary to accomplish the national purpose of preventing an interruption of transportation service threatened by a labor dispute. (Italics supplied.)

The operating agreements not only divested the Army of any operation which it had assumed by the alleged seizure, but likewise left all possession and control in the railroads subject only to the right of the Government, in the event that a labor dispute thereafter threatened, to assume possession and control to the extent necessary to prevent an interruption of transportation.

The government did not raise any flag over the railroad properties (Tr. 168). It neither stationed government representatives at any of the properties nor did it appoint someone at each of the companies as an agent of the govern-

ment (Tr. 167-168). The government in all respects treated the railroads as operating for their own private accounts and not for the government.

The subsequent orders issued by the Army fully bear out the above analysis. For instance, the second paragraph of General Order No. 1 (No. 759, Plff's Exh. No. 10) begins:

2. Operation of Transportation Systems by Existing Management.

From the date of the alleged seizure until the present time all of the instructions issued have proceeded on the premise that during the operation by the railroad management the workers continue to be employees of the carriers rather than of the United States. Illustrative is the letter (No. 759, Defts' Exh. G) sent by the Assistant Secretary of the Army to each of the 196 railroad companies, other than the Chicago, Rock Island and Pacific Railroad Company, a few days after the effective date of the alleged seizure. It reads:

This will further confirm telegraphic advices * * * that you are to proceed with the operation of such transportation system in the usual manner and *to continue the employment of your employees* under the terms and conditions of employment existing immediately prior to such seizure pursuant to said Executive Order. (Italics supplied.)

The carriers have continued to recognize the workers as their employees. They have continued to hire and fire employees as before (No. 759, Tr. 163). They have continued to assign them jobs and direct their work (No. 759, Tr. 163-164). Since the alleged seizure they have entered into more than a hundred contracts with the Brotherhoods covering every aspect of the employment relationship, including contracts for the union shop and check off. (No. 759, Defts' Exhs. RR, SS, TT, HHH, III, JJJ). These contracts do not contain any language which either directly or indirectly

could be construed as treating the United States as the employer. The United States is not a party to any of these agreements.

The union shop contracts have in many instances contained express reference to the carrier as the employer. See for instance, the contract between the Brotherhood of Locomotive Firemen and Enginemen and the Baltimore and Ohio Railroad Company (No. 759, Defts' Exh. SS). The Army, acting on the basis of a legal opinion of the Judge Advocate General, has ruled that these union shop agreements may be entered into between the carriers and the Brotherhoods, without any need for submission to or approval by the Army (No. 759, Defts' Exh. F).

By General Order No. 2 issued February 8, 1951, the Secretary of the Army directed the carriers to give an increase of 5 cents per hour to road employees and 12½ cents per hour to yard employees. (No. 759 Plff's Exh. No. 11). The Government did not purport itself to give the increase as it would have done had it been the employer. The Army did not bargain with the Brotherhoods about this increase. It did not enter into any contract with the Brotherhoods providing for this increase. The size of the increase was not determined by any process affording due process of law. Apparently, it was decided upon by the Secretary of the Army acting on his own initiative (No. 759, Tr. 904-907, 909).

The Secretary of the Army appears to have regarded his direction to the carriers to give this increase as advisory. The increase of the 5 cents per hour to be given the road service employees and the 12½ cents to be given the yard service employees represented less than half of the amount of increase previously offered to the Brotherhoods by the carriers and then and theretofore rejected by the Brotherhoods as inadequate (No. 759, Tr. 668-669, 903-904). As of the date of the hearing below in No. 759, no steps had been taken to incorporate this increase into any contract between the Brotherhoods and the carriers (No. 759, Tr. 906). In those instances in which the carrier declined to

effectuate the directed increase, the Secretary of the Army did not compel the carrier to put the increase into effect, but suggested further bargaining about the matter between the carrier and the Brotherhoods (No. 759, Tr. 78, 144-146, 907, Defts' Exh. E).

With respect to terms and conditions of employment other than wages, carriers made changes detrimental to the employees and the Secretary of the Army refused to intervene to protect the employees (No. 759, Tr. 823-827, Defts' Exh. CCC).

The facts with respect to seizure of the steel mills show that the President there found it necessary for the "United States" to assume not only possession and control, which was all he found necessary to assume in the case of the railroads (*supra*, pp. 5-7, 11), but also for the "United States" to assume operation of the steel mills, which he did not find it necessary to do in the case of the railroads (*supra*, pp. 5-7, 11). In this regard, Executive Order No. 10340 (Appendix D, *infra*, p. 74), provides:

* * * in order to assure the continued availability of steel and steel products during the existing emergency, it is necessary that the United States take possession of and operate the plants, facilities, and other property of the said companies * * * (Italics supplied.)

Executive Order No. 10340, applicable to the steel mills, also indicated the President's intention to change wages and other conditions of employment whereas in the case of seizure of the railroads the executive orders had indicated that the President had no intention at the time of the seizure to alter wages, hours and other conditions of employment as they existed prior to the seizure (*supra*, p. 11). Executive Order No. 10340 (Appendix D, *infra*, p. 74), applicable to the steel mills provides:

3. The Secretary of Commerce shall determine and prescribe terms and conditions of employment under which the plants, facilities, and other properties possession of which is taken pursuant to this order shall be operated. * * *

The executive orders applicable to steel mills and to the railroads contain substantially similar provisions purporting to delegate legislative power from the President to the respective Secretaries to make rules. Paragraph 3 of Executive Order No. 10155 and Paragraph 3 of Executive Order No. 10141 (*infra*, pp. 77, 80), applicable to the railroads provide:

The Secretary may issue such general and special orders, rules and regulations as may be necessary or appropriate for carrying out the provisions, and to accomplish the purposes, of this order.

Paragraph 7 of Executive Order No. 10340 (Appendix D, *infra*, p. 75) provides:

7. The Secretary of Commerce is authorized to prescribe and issue such regulations and orders not inconsistent herewith as he may deem necessary or desirable for carrying out the purposes of this order; and he may delegate and authorize subdelegation of such of his functions under this order as he may deem desirable.

The steel orders and the railroad orders are alike in that they provide that except as the Secretary of Commerce shall otherwise provide from time to time, the management shall continue in the private owners, who shall operate the mills for their own account, exercising their usual managerial functions and collecting and disbursing dividends from the operations. In this respect Executive Orders Nos. 10141 (Appendix E, *infra*, p. 77) and 10155 (Appendix F, *infra*, p. 80), provide:

4. * * * Except so far as the Secretary shall from time to time otherwise provide by appropriate order or regulation, the boards of directors, trustees, receivers, officers, and employees of such carriers shall continue the operation of the said transportation systems, including the collection and disbursement of funds thereof, in the usual and ordinary course of the business of

the carriers, in the names of their respective companies, and by means of any agencies, associations, or other instrumentalities now utilized by the carriers.

5. Except so far as the Secretary shall from time to time otherwise determine and provide by appropriate orders or regulations, existing contracts and agreements to which carriers whose transportation systems have been taken under, or which may be taken pursuant to, the provisions of this order are parties, shall remain in full force and effect. Nothing in this order shall have the effect of suspending or releasing any obligation owed to any carrier affected hereby, and all payments shall be made by the persons obligated to the carrier to which they are or may become due. Except as the Secretary may otherwise direct, there may be made, in due course, payments of dividends on stock, and of principal, interest, sinking funds, and all other distributions upon bonds, debentures, and other obligations; and expenditures may be made for other ordinary corporate purposes.

Executive Order No. 10340 (Appendix D, *infra*, p. 75) provides:

4. Except so far as the Secretary of Commerce shall otherwise provide from time to time, the managements of the plants, facilities, and other properties possession of which is taken pursuant to this order shall continue their functions, including the collection and disbursement of funds in the usual and ordinary course of business in the names of their respective companies and by means of any instrumentalities used by such companies.

5. Except so far as the Secretary of Commerce may otherwise direct, existing rights and obligations of such companies shall remain in full force and effect, and there may be made, in due course, payments of dividends on stock, and of principal, interest, sinking funds, and all other distributions upon bonds, debentures, and other obligations, and expenditures may be made for other ordinary corporate or business purposes.

The executive orders applicable to steel and railroads are further alike in that each provides that the seizure shall

terminate when the labor dispute is settled (*infra*, pp. 75, 78, 82).

Whereas the Secretary of the Army acting with respect to the railroads, which it is recalled, the President in his Executive Order did not find it was necessary for the government to operate (*supra*, pp. 5-7, 11, 15), made operating agreements with the railroad companies whereby the railroads were operated by the companies for their own account (*supra*, pp. 11-12), there being a finding in the executive orders applicable to steel that it was necessary for the United States to operate the steel mills, the Secretary of Commerce took steps to appoint an agent of the United States in each plant to act on behalf of the United States in operating the mills. Over their protest, the Secretary of Commerce named the president of each seized company as "Operating Manager for the United States" and directed them to operate their companies subject to his supervision and in accordance with his regulations and orders (No. 744, R. 22). In respect to the railroads, it will be recalled that the Secretary of the Army neither appointed anyone at the respective railroads as an agent of the government nor did he station any representative of the government at each railroad (*supra*, pp. 12-13). He did not so much as assign any specific representative of the government to carry out functions with respect to any specific railroad (No. 759, Tr. 167-168). The steel companies were directed to open new books of account beginning with the date of seizure. There was no such requirement in the case of the railroads. Indeed, the government did not even make any inventory of the property of the railroads of which it claimed to have taken "possession and control" (No. 759, Tr. 178). The steel companies were directed to fly the United States flag over their plants as a sign that the plants were in government possession. The flags were raised and flown. No flags were flown over the railroads (No. 759, Tr. 168).

Whereas the President and the Secretary of the Army, with respect to the railroads, refused to bargain collectively,

and repeatedly told the Brotherhoods that they must look to the carriers for any changes in wages, hours and working conditions (No. 759, Tr. 144-146, 705-706, 794-817, 823-827, 906-907, Defts' Exhs. E, OO, PP, VV, WW, XX, YY, ZZ, AAA, BBB, CCC), the President and the Secretary of Commerce with respect to the steel companies immediately after the seizure announced an intention to impose upon the steel companies without their consent whatever changes in terms and conditions of employment they saw fit and to pay increased wages and other fringe benefits with the companies' funds (No. 744, R. 103).

4. The effect of the seizure upon collective bargaining.

From the outset of the negotiations between the carriers and the Brotherhoods upon the notices initiated in 1949 and 1950, and even prior to the seizures, the carriers showed an adamancy which reflected the carriers' belief that the President by the exercise of his assumed seizure powers would protect the carriers in their operation of the roads for their own profits on such labor conditions as they deemed fit by preventing any strike. Such had been the carriers' experience in the seven prior seizures of the railroads by the President between 1943 and 1950.⁵ Bargaining

⁵ These were the seizure of the Toledo, Peoria & Western Railway Company in 1943 (see *Toledo, Peoria & Western R.R. Co. v. Stover*, 60 F. Supp. 587 (D. C. S. D. Ill.); the seizures in 1943, 1946, and 1948 growing out of national strikes (see *United States v. Brotherhood of Locomotive Engineers*, 79 F. Supp. 485 (D.C.), dismissed as moot, 174 F. 2d 160 (C. A. D. C.), certiorari denied, 335 U. S. 867, 338 U. S. 872), arising out of the 1948 strike; the seizure of the Bingham & Garfield Railroad Co., in 1945; of the Monon Connecting Railway Co. in 1946; and of the Illinois Central Company, also in 1946. In addition to the suit involved in Case No. 759, there were at least three reported opinions with respect to injunctions issued during the present seizures. *United States v. Brotherhood of Railroad Trainmen*, 95 F. Supp. 1019 (D. C. D. C.); *United States v. Brotherhood of Railroad Trainmen*, 96 F. Supp. 428 (D. C. N. D. Ill. E. D.); *United States v. Switchmen's Union of North America*, 97 F. Supp. 97 (D. C. W. D. N. Y.). See also the order enjoining a strike in *United States v. Brotherhood of Railroad Trainmen*, 27 L. R. R. M. 2151 (D. C. N. D. Ill. E. D.).

between the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Locomotive Engineers, respectively, and the carriers on their notices initiated on November 1, 1949 and January 6, 1950, did not begin until subsequent to the seizure (No. 759, Tr. 658, 861). After the seizure the negotiations reflected the carrier's attitude that they had no reason to make such concessions as the employees requested because the carriers were operating their roads to their profit while their workers had lost their right to strike for the duration of the seizure (No. 759, Tr. 919-920). During the period subsequent to Presidential seizure the carriers had net operating profits of one billion six hundred and sixty million dollars (\$1,660,000,000) after taxes (Counterclaim and Cross-Claim, Par. 8, calculated upon official reports of the Interstate Commerce Commission). The employees represented by the Brotherhood of Locomotive Engineers, the Order of Railway Conductors and the Brotherhood of Locomotive Firemen and Enginemen, numbering approximately 150,000 operating employees, have continued to work at 1948 wages and working conditions, supplemented in most cases by the almost insultingly low increase advised by the Secretary of the Army in February 1951, of 5 cents an hour for roadmen and 12½ cents per hour for yardmen, an amount about half of the carriers' then outstanding offer (No. 759, Tr. 669, 903).

The only indication which the Brotherhoods had of any willingness on the part of the carriers to engage in bona fide collective bargaining occurred after the Brotherhoods went on strike on March 9, 1952 on the New York Central Lines West of Buffalo and the Terminal Railroad Association of St. Louis (No. 759, Tr. 916). At that time L. W. Horning, vice president of the New York Central, and chairman of the Eastern Carriers Conference Committee, phoned the executive heads of the Brotherhoods, offered to fly to Cleveland, Ohio, to meet with them and indicated that he was prepared to consider a proposition for settlement much more favorable to the Brotherhoods in its terms than

any which the carriers had theretofore considered (No. 759, Tr. 917). As soon as the district court sitting below in No. 759, on March 11, 1952, issued its restraining order directing the Brotherhoods to call off the strike and directing their members to return to work. Vice President Horning cancelled his proposed conference with the Brotherhoods (No. 759, Tr. 917, 918).—

The record in the steel cases, so far as we have been able to ascertain, contains no material directly relevant to the issue of whether the steel negotiations were likewise conducted on a sham basis because of some feeling on the part of either the steel companies or the unions that the President would intervene by seizure to prevent one or the other of the parties from backing up its bargaining position with a show of economic strength. The United Steelworkers of America, C.I.O., in their Brief as Amicus Curiae, filed herein, do assert that the negotiations carried on with respect to their notices served on November 1, 1951, were at all times a sham and a fiction except after the strike which they began on April 29, 1952, immediately following the decision of Judge Pine in the court below, issued earlier that same day, holding the seizure unconstitutional and returning the mills to the owners. However, the Steelworkers attribute the mill owners' failure to negotiate in good faith to the carriers' insistence upon the government's allowing them a price increase, before they would settle with the union (*ibid.*, p. 17). The Steelworkers do assert that only the possibility of a strike would give meaning to the process of collective bargaining (*ibid.*, p. 19). Just as in the case of the strike on the railroads, the strike caused the carriers to approach the bargaining table with an indication of a desire to bargain collectively, so too the strike at the steel mills moved the steel employers to giving indications that a negotiated settlement might be reached (*ibid.*, p. 20). And again, as in the railroad case, just as the restraining order terminating the strike ended a willingness on the part of the carriers to engage in bona fide bargaining

so the stay order issued by the Court of Appeals for the District of Columbia Circuit below in Case No. 744, by returning the steel mills to their former status under seizure, put an end to all bona fide bargaining by the steel companies. The Steelworkers attribute the willingness of the steel companies to ~~try to~~ reach a genuine settlement between the date of Judge Pine's decision and the stay order of this Honorable Court as due to the fear of the steel companies that the President would impose higher wages than the steel companies would agree to unless they first made a bargain with the union (*ibid.*, p. 20):

5. The extent to which the emergency procedures of the Labor Management Relations Act and the Railway Labor Act were exhausted before or after seizure.

The emergency provisions set out in Section 10 of the Railway Labor Act had been exhausted with respect to the Switchmen's Union of North America prior to the seizure of the Rock Island on July 8, 1950, by Executive Order No. 10141 (No. 759, Tr. 43, 44). Both at the time of the seizure of the Rock Island on July 8, 1950, and at the time of the seizure of the other 196 major railroads on August 29, 1950, by Executive Order No. 10155, the emergency procedures of Section 10 of the Railway Labor Act had been complied with and exhausted by the Switchmen, the Trainmen, and the Conductors, the labor organizations there involved (No. 759, Tr. 23, 43). The procedures of Section 10 were exhausted as to the Brotherhood of Locomotive Firemen and Enginemen on February 25, 1952, the expiration date of the thirty-day cooling off period subsequent to the issuance of a report by the President's Emergency Board (No. 759, Tr. 44).

The procedures of Section 10 of the Railway Labor Act have never been applied to the Brotherhood of Locomotive Engineers. The President has never appointed an emergency board to consider the labor dispute occasioned by the inability of the Brotherhood of Locomotive Engineers

and the carriers to reach an agreement (No. 759, Tr. 878, 789, Defts. Exhs. A, B, and GGG).

In respect to the steel dispute, the emergency provisions of the Labor Management Relations Act were never resorted to. The President did refer the dispute to the Wage Stabilization Board and the government contends the procedures before the Wage Stabilization Board afforded an adequate substitute for the emergency provisions of the Labor Management Relations Act (Gov't. Brief No. 745, pp. 153-163).

SUMMARY OF ARGUMENT

I.

The President has no power under the Constitution of the United States to seize private property in the absence of a valid congressional enactment authorizing the seizure.

The Executive Orders seizing the steel companies and the railroads purport to be a taking of private property for public use. In this brief the President's power to issue these executive orders will be discussed on the assumption that they are essentially a taking of private property. It should be observed, however, that when the orders are analyzed, they constitute primarily orders dealing with labor relations rather than a taking of property, except to the extent that a suspension of either the employers' or the employees' power to refrain from entering into a labor contract or to make it on such terms as they see fit may constitute a taking of property. There can be no doubt that the President has no power under the Constitution by executive fiat to fix wages, hours and working conditions nor to prescribe whether they shall be fixed by compulsory arbitration, limited forms of bargaining or by some other method. We do not believe the President claims that his executive orders can be justified except as a taking of property and we will here test them as such.

All taking of property by the government is an exercise

of eminent domain. By the time of Blackstone's Commentaries it was established in England that the monarch could not take property except for the purposes, upon the occasions, to the extent, and in the manner that he was authorized to do so by an act of parliament. The Constitution of the United States makes no mention of the power of eminent domain. The Fifth Amendment by implication assumes that there is a power in the federal government to take property for it provides, however, without any express reference to the federal government as distinguished from the state, "nor shall private property be taken for public use without just compensation."

Because of the failure to include the power of eminent domain in the enumerated powers given to the federal government by the Constitution, and despite the Fifth Amendment, for almost a century after the adoption of the Constitution it was seriously doubted that the federal government had any power of eminent domain, except in the District of Columbia, as to which the federal government exercised the powers which in the rest of the country had been reserved to the states. During the pre-Civil War period, whenever the federal government desired to take property it applied to the state governments for a delegation from the state to the federal government of the power of eminent domain which it was assumed had been reserved exclusively to the states.

The state supreme courts uniformly followed the English practice and held that the power of eminent domain is a legislative power and can be exercised by the executive only for the purposes, to the extent, and by the procedures established by an act of the legislature.

In 1875 this Court held that the federal government had the power of eminent domain as an inherent part of its sovereign powers. *Kohl v. United States*, 91 U. S. 367. Since that date this Court has never been called upon to determine the precise issue of whether that power is vested in the executive to any extent. It has stated that it is a

legislative function, not to be exercised by the executive. *Hooe v. United States*, 218 U. S. 322, 336 (1910). The lower federal courts have uniformly followed the numerous and consistent state decisions that eminent domain is exclusively a legislative power. And it is today hornbook law that all eminent domain powers, both federal and state are exclusively legislative.

The only power which the Executive has to take property without the proper prior authorization is limited to a taking in a theater of war. A taking of property in the theater of war is regarded as an executive act, a part of the waging of war and therefore within the President's executive powers as Commander in Chief of the armed forces. A few of the cases decided prior to 1875 seem to extend beyond the theater of war the President's power to take when the emergency is too great to first permit of resort to legislative procedures. It is to be recalled that at the time these cases were decided it was believed that the federal government had no power of eminent domain and could only act when it secured a delegation from a state. This cumbersome procedure undoubtedly led to some bad law, which now that it is recognized Congress has the power of eminent domain, should be overruled rather than extended. There is no reason why as to the legislative power of eminent domain, the rule applicable to all other legislative powers should not be applied, that even in emergencies, all legislation must be enacted by Congress, not by the President.

The assumption that the executive has some power to take property outside of the theater of war, in emergencies, without legislation so authorizing, is based upon a misreading of the cases as to the power of a public officer to destroy property to prevent the spread of fire or flood. The uniform law is that such destruction of property to prevent imminent disaster is not a governmental function. Every private individual has the same power, as part of his right to self protection or to save the life or property of

another. The cases holding that a public officer is not liable for such destruction of property are based on the law that he acts as a private individual and as such is not liable.

II.

The President has no power to seize private property in connection with a labor dispute when Congress has provided in the Labor Management Relations Act and the Railway Labor Act for retention of collective bargaining during national emergencies, subject to a cooling off period, and rejected proposals for seizure—and other bars to economic self-help—as inconsistent with collective bargaining.

We believe that in Point I we have so conclusively demonstrated that the President has no inherent power to seize private property, as to make this point entirely unnecessary. However, the Government is so insistent that the President must have some power to deal with emergencies, at least until Congress can act, that we believe we would be remiss in our duties, were we to fail to point out that here Congress has acted. It has not merely “occupied the field,” so to speak, and thereby excluded presidential action, assuming he had any residual power to act, but it has acted in such a manner that the President’s action is inconsistent and in conflict with the congressional enactment. The President has not acted to fill a vacuum. Instead he has displaced congressional occupation of the field by an inconsistent enactment of his own. This, of course, is absolutely unconstitutional on the part of the President.

The national emergency provisions of the Labor Management Relations Act are modeled upon the emergency board provisions of the Railway Labor Act. Both statutes provide that the President may, in the event of a national emergency, appoint a board of inquiry. If such a board is appointed, there may follow a period during which the parties will be required to refrain from a strike or a lockout.

At the expiration of the cooling off period the parties are free to resort to a show of economic strength.

In enacting the Labor Management Relations Act, Congress rejected seizure provisions on the ground that a seizure would, by its nature, preclude either party from backing up its bargaining demands with a threat of exercise of economic power. The Congress which enacted the Railway Labor Act similarly refrained from including therein any bar upon strikes subsequent to the expiration of the cooling off period, likewise upon the express ground that no genuine collective bargaining was possible unless each of the parties had the right to resort to economic self-help to compel the other to come to terms.

This Court has recently held that Congress, by guaranteeing to workers the right to collective bargaining, had thereby necessarily guaranteed the right to strike as an inherent feature of collective bargaining.

The facts with respect to the course of bargaining negotiations in both the instant case and in the railway seizure case, demonstrate that Congress was correct in its assumption that bargaining negotiations are a sham and a fiction when one of the parties at the bargaining table has no power to inflict any economic loss on the other because it must continue to operate without the right to close down operations either by a strike or a lockout.

ARGUMENT

Relationship of Issues in Cases Nos. 744 and 745 to Issues in Case No. 759^o

The Brotherhoods in their motion to expedite the consideration of their petition for a writ of certiorari in *Brotherhood of Locomotive Firemen and Enginemen v. United States*, No. 759, this Term, requested that the petition be granted and that case set down for oral argument immediately following oral argument in these cases, in order that the decision in the instant cases, which might

constitute a precedent applicable to certain of the issues in case No. 759, be not issued without the petitioners in case No. 759 having an opportunity to present to this Court their position in respect to these issues. This Court instead of granting that request, entered an order permitting the petitioners in case No. 759 to present oral argument and file briefs *amici* with respect to such issues in the instant cases as might be applicable to case No. 759.

We have accordingly carefully limited ourselves to the argument of the two questions presented, which are common to the two cases. However, before turning to those questions we desire at the outset to call attention to various aspects of the issues in case No. 759, which we fear might inadvertently be affected by the decision issued herein should this Court not limit itself strictly to the decision of the two questions presented.

The instant cases, which for convenience herein we shall designate the steel cases, present the issue of the power of the President to seize steel mills over the objection of the owner. Case No. 759, which for convenience we shall designate as the railroad case, presents the issue of the power of the President to seize railroads over the objection of the employees (for purposes of this brief we shall assume, without conceding, that the President has in fact seized railroads, although in Case No. 759, we challenged the seizure as a sham and a fiction).

We believe that from several points of view the employees have rights which the Constitution of the United States guarantees and protects against unconstitutional seizure to the same full extent as the rights asserted by the steel companies.

The steel companies, it is true, own vast plants, real and personal property, which are the traditional private property protected by the Constitution. But the steel companies do not regard the seizure as having the effect of taking this property from them permanently. They do rely on loss of control over the terms and conditions of employment in

the mills for the period of seizure and threatened permanent loss of the millions of dollars which the Government would pay over to employees out of company funds were it to put into effect the wage increases recommended by the Wage Stabilization Board.

We do not make the above distinction between a permanent taking of the steel mills which is not here involved, and a temporary taking away from the owners of control over the labor relations in those mills and the payment to workers out of funds of the companies of amounts which the steel mills have never agreed to pay, as lessening the very serious and fundamental violation of the constitutional rights of the steel mills. We point to the distinction rather as pointing up the closely analogous position of the railroad workers and the steel employers.

The railroad workers have an interest in not working for wages, terms and conditions of employment to which they have not agreed, equal in character and rank, so far as protection by the Constitution is concerned, with the interest of the steel employers in not having their mills operated on labor terms to which they have never agreed. The employers' interest in not having wages, hours, terms and conditions of employment imposed on their operations by unconstitutional methods is certainly of no higher rank than the employees' interest in not being forced by unconstitutional methods to work for wages, hours and working conditions to which they have not agreed. If anything, in view of the fact that the workers' interest involves not only property rights but also human rights, the taking of their labor, "the sweat of his brow, the intelligence of his brain," which admittedly outrank property rights, the employees' constitutional standing is higher than the employers. We mention this merely to avoid any leveling comparisons from the emphasis we herein place on the common interests of employer and employee alike in the constitutional issues now before this Court in the steel cases.

Looking at the employee's interest from a property point of view, we find that his interest in his liberty of contract, his freedom to work only under such terms of employment as he agrees to voluntarily is a property right in every respect the same as the employer's interest in his freedom to contract for terms of employment from the employer's side of the bargaining table.

Mr. Justice Brandeis in *Dorchy v. Kansas*, 272 U. S. 306 (1926) at p. 311, said:

The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful.

An employee's right to sell his services and hold a job is the way he carries on business. In *Ex Parte Wall*, 107 U. S. 265 (1882), the Supreme Court conceded (at p. 289):

“... that an attorney's calling or profession is his property, within the true sense and meaning of the [Fifth Amendment of the] Constitution...”

Taking an employee's labor and paying the laborer less than he consents to work for is the same as taking the employer's funds to pay an employee more than the employer agrees to pay. Upon economic analysis labor, though not as tangible as the physical property of the employer, is intangible property. It is labor that makes funds. The seizure of labor as it is being put into productive effort is a seizure of the same sort as a seizure of the finished products of labor, or their converted form, the employer's fund, which come both from the employee's labor and from the employer's managerial genius and his devotion of plant and equipment to the enterprise.

The laborer is robbed by an unconstitutional giving of more of his labor to the employer than the amount of labor he would agree to give for the price paid, equally as much as the employer is robbed by an unconstitutional

paying of more to labor than the employer has agreed to pay.

The issue in the steel cases does not involve any attack upon the admitted right of the state by constitutional methods to fix wages, which may result, in labor receiving less than it would have agreed to work for or employers paying more than they would otherwise have agreed to pay. That is, the steel case involves no attack upon the regulatory power of the government over labor relations, but rather is concerned solely with the constitutional question of which branch of government has that regulatory power, whether the executive or the legislative. In the railroad case we are concerned with additional constitutional questions:

One of these is whether Congress can delegate the seizure power to the executive without fixing the method, purpose and standards for compensation for the taking, both as it applies to the employer and to the employee. In the instant cases the Brotherhoods have given some consideration to standards for determining compensation due employees for the unjust taking of their labor and paying wages less than the employees would have agreed to work for. The difficulties of determining a standard for compensating the steel companies for their losses due to seizure are equalled, if not exceeded by the parallel problem as to the employees. This issue was injected into the railroad case by the filing by the Brotherhoods of a counterclaim and cross-claim as part of their answer in the district court. In this counterclaim and cross-claim the Brotherhoods pray for a declaration that the seizure orders were invalid and that the employees they represent are not employees of the United States but employees solely of the carriers. In the alternative they prayed that if the Court found these persons were employees of the United States, the court should declare that the United States should not permit the carriers to receive and retain the profits and should enjoin and restrain the carriers from receiving, retaining, and

disbursing any profits from any past, present or future operations during the period of seizure while the employees from whose services the profits were in part derived were employees of the United States. Appropriate motions were made to add the 197 carriers as additional parties, to be named as cross-defendants. The prayer also requested that an accounting should be had of the net profits, in said accounting setting aside and allocating for ordered payment to employees of all such moneys as shall, additional to sums already paid to such employees, fairly and justly compensate each of said employees for the service and labor performed as employees of the United States. The government filed a motion to strike the counter-claim and cross-claim. The district court has not ruled on either the Brotherhoods' motion to add parties or the government's motion to strike. The government's motion to strike the counterclaim and cross-claim was based on the ground it was an unconsented suit against the United States. The arguments presented in the government's brief in support of the motion to strike are strikingly in contrast with the arguments made by the government in Nos. 744 and 745 as to the ease and certainty of an adequate remedy at law for an illegal taking by presidential seizure.

Another issue in the railroad cases is whether either the legislature or the executive may in effect draft labor to be used not for the public purposes but for the private profit of the employer—that is, if there is going to be a seizure in a labor dispute, must not the employer's profits as well as the employees' labor be seized. Several careful studies of the problem of seizure in labor disputes have been made. In listing the requirement for a valid statute, all the studies point to two fundamental requirements: *first*, there must be provided some appropriate method of fixing wages, hours and working conditions during the period of government seizure; and *second*, such a seizure must necessarily be conditioned upon the profits going into the United States Treasury. These two provisions are deemed

essential in order that the seizure shall not plainly collide with the restrictions of the Fifth and Thirteenth Amendments. Eugene C. Gerhart, *Strikes and Eminent Domain*, 30 J. Am. Jud. Soc. 116 (December 1946); Twentieth Century Fund, Labor Committee, *Strikes and Democratic Government* (1947), pp. 27, 30-31; New York University, Fourth Annual Conference on Labor, *Government Seizure in Labor Disputes* (1951), pp. 283, 285-289.

Eugene C. Gerhart in the article just cited states (at pp. 118, 120-121, 122):

'Involuntary servitude', prohibited by the Thirteenth Amendment, it is well settled, refers to *personal* servitude, one *private* party to another * * *

The employees should not be compelled to work for a *private* company's profits while it is under *public* control by the Government. Limiting the company's net profits during Government operation to the fair rental value of its property, the balance to be paid to the Federal Treasury, would accomplish this:

a. It would provide the company with just compensation for the deprivation of its beneficial enjoyment of its property.

b. It would assure the employees that they in reality were working for the *Government* and not for the private company.

7. Labor is given an alternative weapon as a substitute for taking away its right to strike; namely, limiting the company's *net* profits. This will put pressure on the company similar to that applied by a strike, to reach an agreement with the employees, * * * (Italics in original).

The Twentieth Century Labor Committee in the study cited, refers to the article by Mr. Gerhart and states (p. 27):

The author thinks, and so do we, that to require anyone to work for a *private* employer on the basis of compulsion, either as to hours, wages or working con-

ditions, is an invasion of the right of private contract;
(Italics in original.)

The Twentieth Century Labor Committee was composed of the following prominent industrialists, labor leaders and public representatives: William H. Davis, Chairman, William L. Chenéry, Howard Coonley, Clinton S. Golden, Sumner H. Slichter, Robert J. Watt, and Edwin E. Witte.

In this connection see *Anderson v. Chesapeake Ferry Co.*, 186 Va. 481, 45 S. E. 2d 10, holding that profits belong to the state when it seizes a transportation system shut down by a strike and uses the power of the state to supply a labor force which the transportation system could not itself obtain because of its unwillingness to come to terms with its employees respecting their wages, hours and working conditions. The court held further that just compensation to the employer for the taking should not be based on a supposition that the property taken was a going concern when in fact a strike would have kept the business inoperative had not the state intervened by seizure to provide the only basis upon which labor could be compelled to stay at work.

Still other questions presented in the railroad case are whether the executive, if there has been a valid delegation to it by Congress, may exercise that delegated power in arbitrary and capricious fashion; and whether a judicial decree, based upon arbitrary and capricious executive action, which coerces labor under terms not agreed to and not fixed by due process, violates the Fifth and Thirteenth Amendments to the Constitution of the United States. We shall not discuss those issues here but merely wish to call their existence to this Court's attention.

I.

The President Has No Power Under the Constitution of the United States to Seize Private Property in the Absence of a Valid Congressional Enactment Authorizing the Seizure.

The Executive Orders seizing the steel companies and the railroads, are worded in the phraseology applicable to a taking of property. However, in view of the fact that the orders themselves disclose that the taking is limited to a control of labor relations, including of course the right to use the steel companies' funds to pay increases in wages, the orders would probably have been more realistic, but more obviously unconstitutional, had they instead of purporting to take property, purported to legislate concerning terms and conditions of employment. Thus in the steel cases the president, if he had not wanted to try to support his action by some supposed greater right in the executive to take property than to impose a labor code, could have ordered whatever increase in wages, improved terms of employment, increased fringe benefits he desired and done nothing about seizing the property. In railroads he could have phrased the order as a direction to employees to work for previous wages until he should by order direct new wages.

We shall here confine our discussion of the validity of the President's executive orders to the assumption they constitute a taking of property as they purport to. Their invalidity upon any other basis is so obvious that the government has not attempted to defend them on any other basis.

The term "eminent domain" covers all taking of property by the government whether real, personal, or personal services (*Sackman and Van Brunt, Nichols on Eminent Domain, 3d ed., Vol. 1, (1950), p. 2, § 1.11*):

Eminent domain is the power of the sovereign to take property for public use without the owner's consent.⁸

⁸ *United States-Scott v. Toledo*, 36 F. 385. CAA 688.

By the time of Blackstone's Commentaries it was well established in England that the monarch could not take property against an owner's will except when authorized so to do by Act of Parliament. Thus see I Commentaries, (Lewis, 1900) 139-140:

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that, the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modeled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power which the legislature indulges with caution, and which nothing but the legislature can perform.

The Constitution of the United States makes no mention of the power of eminent domain. The Fifth Amendment presupposes some power in the federal government to take property for it imposes a limitation upon the taking of property. It reads:

nor shall private property be taken for public use without just compensation.

The history of the pre-Civil war takings of property is reviewed in *Sackman and Van Brunt: Nichols on Eminent Domain* (3rd ed.), Sec. 1.24, pp. 48-49:

Originally there was some doubt with respect to the power of eminent domain in the federal government since, it was argued, the United States is a government of delegated powers and the powers of eminent domain had not been specifically granted in the federal constitution. In the early days the federal government's power was exercised without question in the federal courts only insofar as acquisitions within the District of Columbia were concerned. * * *

Because of its reluctance to arouse the animosity of those who favored the theory of state's rights the federal government initiated proceedings in the state courts to ascertain the compensation to be paid upon a federal taking by eminent domain. The judicial reasoning in support of such proceedings by the United States was based upon the theory that such action by the federal government was, in effect, an exercise of the state's power of eminent domain which had been delegated to the federal government.

In 1872 the power was exercised by the United States with the consent of the state wherein the property was located by the bringing of a proceeding in the federal court. (Footnote references omitted.)

In *Burt v. Merchants-Ins. Co.*, 106 Mass. 356 (1871), the court approved a state statute delegating eminent domain powers to the federal government. The court observed that from a very early period the state legislature had followed the practice of making such delegations to the federal government. For other cases upholding state statutes delegating eminent domain power to the federal government see *Matter of Petition of United States*, 96 N. Y. 227 (1884); *Reddall v. Bryan*, 14 Md. 444 (1859); *Gilmer v. Lime Point*, 18 Cal. 229 (1861).

With respect to the question of whether the sovereign power of the state to exercise eminent domain powers was vested in legislative branch of the state government as distinguished from the executive branch of the state govern-

ment, the state supreme courts have uniformly applied the rule stated in Blackstone's Commentaries. They hold that the power of eminent domain is "a strictly legislative function". *Sholl v. German Coal Co.*, 118 Ill. 427 (1887); *San Joaquin Irrigation Co. v. Stevenson*, 164 Cal. 221 (1912); *Londoner v. Denver*, 52 Colo. 15 (1912); *Parham v. Justices, etc., Decatur County*, 9 Ga. 341 (1851); *Brookville v. Metamora Hydraulic Co.*, 91 Ind. 134 (1883); *Sesson v. Supervisors*, 128 Ia. 442 (1905); *Aldridge v. Tusumbia, et al. R. R. Co.*, 2 Stew. & Port. 199 (Alabama, 1832):

In 1875 this Court held that the federal government had the power of eminent domain as an inherent part of its sovereignty. *Kohl v. United States*, 91 U. S. 367. Since that date this Court has never had the occasion to determine the precise issue of whether that eminent domain power is vested in the executive to any extent. On two occasions it has stated that a federal taking is valid only where it is pursuant to an act of Congress. In *Hoe v. United States*, 218 U. S. 322, 336 (1910), this Court stated:

The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some Act of Congress, is not the Act of the Government.

In *United States v. North American Co.*, 253 U. S. 330, 333, Mr. Justice Brandeis speaking for the Court said:

In order that the Government shall be liable it must appear that the officer who has physically taken possession of the property was duly authorized so to do either directly by Congress or by the official upon whom Congress conferred the power.

The lower federal courts have on at least three occasions been squarely called upon to rule upon the issue of whether the federal power of eminent domain was solely a legislative power. They have uniformly so held. *United States v. Certain Tract of Land*, 79 Fed. 940 (E. D. Pa., 1894); *United States v. Rauers*, 70 Fed. 748 (S. D., Ga., 1895); *United States v. Montgomery Ward & Co.*, 58 F. Supp. 408

(D. C., N. D., Ill., E. D.) certiorari denied, 324 U. S. 858, reversed on other grounds, 150 F. 2d 369 (CA 7), vacated as moot, 326 U. S. 690. Cf. *Toledo, Peoria & Western v. Stover*, 60 F. Supp. 587 (D. C., S. D., Ill.).

In *United States v. Certain Tract of Land*, 70 Fed. 940, the United States brought proceedings to condemn certain parts of the battlefield of Gettysburg as a national memorial park. Congress had passed the Gettysburg appropriations Act; providing funds for markers, tablets and paths but had given the executive no express authority to acquire real estate. The petition for condemnation was quashed. The court said (at p. 942):

The power referred to (taking of property for public use) is, not exercisable at all in the absence of legislative authorization.

In that case the Court mentioned the existence of a federal statute providing the procedure to be used in condemning and stated that in addition to providing the procedure for the taking, Congress must also empower the executive to acquire the property in question. Promptly after the above decision Congress passed a Joint Resolution (June 5, 1894) granting the Secretary of War authority to acquire real estate by purchase or condemnation for the purposes set out in the Gettysburg Appropriation Act. This Court thereafter sustained condemnation under the latter joint resolution. *United States v. Gettysburg Electric Railway Co.*, 160 U. S. 668.

It is today hornbook law that eminent domain is exclusively a legislative function. 18 American Jurisprudence, p. 637, Eminent Domain, Sec. 9, states:

Under the customary division of government power into three branches, executive, legislative and judicial, the right to authorize the exercise of the power is wholly legislative and there can be no taking of private property for public use against the will of the owner without direct authority from legislature.

See also Ann. Cas. 1918 E. 41.

The only power which the President has to take property without prior authorization is limited to seizures made within the theater of war. Such a taking is not legislative in character. Rather it is executive, the act of the Commander-in-Chief of the Armed Forces, in waging war. While a few of the early cases contain language which would seem to indicate that the President's taking may be justified in grave emergencies (see *United States v. Russell*, 13 Wall 623, 627 and other cases cited, Gov't. Brief, No. 745, pp. 132-140) these cases were decided at a time when this Court had never sustained in the federal government any power of eminent domain. The government followed the practice, when it needed property, of applying to the states for a delegation to the United States of the states' admitted powers of eminent domain. When it desired to acquire property even for such defense construction as arsenals, munitions dumps and forts the federal government followed the practice of applying to the states for a grant of power to condemn. It is therefore not surprising to find a few early cases seeming to approve a seizure in a very grave emergency, even if beyond the theater of war operations. Now that it is established the federal government itself has the power of eminent domain, there is no longer the need to stretch the war cases beyond their legitimate applicability to the theater of war. Instead of the cumbersome procedure of securing a delegation of power from a state, the federal government can act promptly by appropriate congressional enactment. If, as we believe, the power of domain is strictly legislative, it may be exercised solely by the legislature. In no other field of legislation does the existence of any emergency transfer legislative power to the executive.

The plea that emergencies may be so grave as to require executive action before the Congress has time to act, is a plea of lack of confidence in our constitutional form of government. Even in such matters as labor issues, Congress can and has operated with great speed when it was faced with an emergency.

That the Congress of the United States is able in emergency situations to provide specific standards which meet the constitutional tests while assuring that the transportation requirements of the emergency will not be endangered by strike situations has been demonstrated by the World War I experience.

In 1916 a nationwide rail strike was threatened for September 2nd. President Wilson met with the parties. He became convinced the Brotherhoods' demand for an 8-hour day without reduction of the 10 hours take home pay was sound and that they properly refused to submit the demand to arbitration. Accordingly, on August 29, 1916, President Wilson addressed a joint session of Congress requesting that Congress avert the strike by passing an 8-hour law applicable to railroad workers, which would prohibit any reduction in take home pay. 53 Cong. Rec. 13355-13357. Congress passed the 8-hour law immediately. It was signed by the President on September 3, 1916 (39 Stat. 721, at 436). The strike was thus averted. See *Wilson v. New*, 243 U. S. 332, in which the Court in upholding the constitutionality of this 8-hour law recited its history. This history was also repeatedly mentioned on the floor of Congress during the debates leading to the enactment of the Railway Labor Act of 1926 when proponents of the bill defended its failure to provide for compulsory arbitration or to ban strikes. See for instance Representative Barkley's statement at 67 Cong. Rec. 4511-4512. See also 67 Cong. Rec. 4521.

The government in arguing that the executive has some power to take property outside of the theater of war, in emergencies, without the prior authorization of Congress, relies in part on cases as to the power of a public officer to destroy property "in times of great public danger and when the public safety demands it". *United States v. Pacific Railroad Co.*, 120 U. S. 227, 238. Gov't. Brief, No. 745 pp. 132-133. The uniform law is that a destruction of property to prevent the spread of fire or flood or other imminent disaster is not a governmental function. Every

private individual has the same power, as part of his right to self protection or to save life or property. The cases holding that a public officer is not liable for destruction of property proceed upon the theory that he acts as a private individual and as such is not liable; *Sackman and Van Brunt*: Nichols on Eminent Domain (3rd ed.) Sec. 1.43.

II.

The President Has No Power to Seize Private Property in Connection with a Labor Dispute When Congress Has Provided in the Labor Management Relations Act and the Railway Labor Act for Retention of Collective Bargaining During National Emergencies, Subject to a Cooling-Off Period, and Rejected Proposals for Seizure—and Other Bars to Economic Self-Help—as Inconsistent With Collective Bargaining.

If, as we have argued in Point I, the power of eminent domain is a legislative function, then the President has no power to take property except as authorized by Congress. The government argues that although the power to take property is primarily a legislative function, this does not preclude the President from acting in an emergency until Congress has time to act. That argument, which we believe is entirely unsound, would nevertheless give the government no support in the present case, because Congress has already acted. Congress has not only acted, but its action is of such a character as entirely to preclude presidential seizure.

In both the Railway Labor Act (45 U. S. C., 151, *et seq.*), and the Labor Management Relations Act (29 U. S. C., 141, *et seq.*), Congress made specific provision for the manner in which it desired labor disputes to be handled in the event of an emergency. The provisions of the Labor Management Relations Act for the handling of national emergencies was described by its sponsors in Congress as patterned after the provisions of the Railway Labor Act (93 Cong. Rec. 6386). The common features of these two statutes are readily ap-

parent. The Railway Labor Act, as enacted in 1926, provides in Section 10 thereof, that if any dispute between a carrier and its employees could not be adjusted by negotiations, mediation, or proffers of arbitration and threatened "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service," the President may appoint a board to investigate and report respecting the dispute. It provides further that such a board shall make a report to the President within thirty days from the date of its creation. Section 10 prohibits the parties to the controversy from making any change in the conditions out of which the dispute arose from the date of the creation of the board until the expiration of thirty days after the board has made its report. During the hearings leading to the enactment of the Railway Labor Act, this section was repeatedly described as providing for a sixty-day cooling off period.⁶ The Railway Labor Act makes no express provision as to what, if any, course is to be followed at the expiration of the sixty-day cooling off period. The legislative history shows that Congress intended that the employees should be free to strike in support of their collective bargaining demands at the expiration of the period of thirty days following the rendition by the board of its report. Congress rejected amendments which would have extended beyond thirty days the time within which the emergency board would have been required to report (67 Cong. Rec. 4727). The opposition to these amendments was based on the unwillingness of Congress to extend further the time during which employees would be prohibited by law from striking in support of their bargaining demands (67 Cong. Rec. 4662-4664). See also a similar explanation by Mr. Donald Richberg, during the hearings, of the necessity for limiting the emergency board to thirty days within which to report. (Hearings before the Commit-

⁶ Hearings before Committee on Interstate Commerce, U. S. Senate, 69th Cong., 1st Sess., in S. 2306, p. 14; Hearings before Committee in Interstate and Foreign Commerce, U. S. House of Representatives, 69th Cong., 1st Sess. on H. R. 4729, p. 270.

tee on Interstate and Foreign Commerce, House, 69th Cong., 1st Sess., on H. R. 7180, p. 100.)

Indeed, so strong was the feeling against any interference with the right to strike that Congress deliberately refrained from any express limitation on the right to strike even during the thirty days the emergency board was to have to consider a case and the thirty days thereafter. Twice during the debates on the floor of Congress in 1926 the proponents of the bill explained their refusal to write into the law any limitation on the right to strike, by referring to statements made by Mr. Robertson, who then as now was President of the Brotherhood of Locomotive Firemen and Enginemen. Congressman Mapes stated (67 Cong. Rec. 4524):

Mr. Robertson, in a statement on page 270 of the House hearings, states very clearly what the parties who negotiated this agreement [referring to the agreement reached by the carriers and the labor organizations to support the Howell-Barkley bill] meant by the language employed. I will not take the time to read his statement now, but will include it in my remarks:

“ * * * In order that the committee might know what motivated or prompted the parties in negotiating this Article 10 * * *

‘We felt the word “conditions” very clearly described the situation which would be confronting us when a threatened interruption to interstate commerce occurred. The railroads agreed with us that the word “conditions” meant if they threatened, or rather, served notice on us of a desire to reduce wages, they would not be permitted to reduce wages during this 60 days mentioned in Article 10; if we sought an increase in wages or a change in conditions, that is, a change in working rules—we agreed as practical men that we would not, nor would we have any reason for authorizing a strike unless it were to change those conditions; therefore, we would not authorize a strike, because no strike was ever authorized, except to change conditions. The only exception that there could be would be that if the railroad disobeyed the law, or, rather, disrespected that particular provision and forced arbitrarily a reduction of wages upon the employees, we felt we would then be justified; perhaps, in authorizing a strike if it was necessary to preserve the conditions, but we would not be changing the conditions.’

The second instance in which Mr. Robertson was quoted on the floor of Congress to the same effect appears at 67 Cong. Rec. 4588.

On numerous occasions during the debates on the 1926 Act, its proponents explained on the floor of Congress how inconsistent with the bill it would be to prohibit strikes. Congressman Barkley, the sponsor of the bill in the House, in his opening statement gave a history of the successful efforts of railroad labor over the years to defeat repeated attempts in Congress to write anti-strike provisions into railway legislation (67 Cong. Rec. 4513, 4517).⁷ Several

⁷ In 1919, Congress in adopting the Esch-Cummins Act rejected amendments which would have imposed compulsory arbitration and anti-strike provisions. The bill (H. R. 10453; 66th Cong., 1st Sess.) as it was reported out by committee did not contain any anti-strike provisions (58 Cong. Rec. 8315). Congressman Webster, in the course of debates, proposed a substitute for the labor provisions of the committee bill (Section 300). Congressman Webster's substitute required compulsory arbitration and contained criminal penalties for strikes during the pendency of the matter in dispute (58 Cong. Rec. 8480). Anderson proposed a substitute to Webster's substitute. Anderson's bill provided no penalties either civil or criminal (58 Cong. Rec. 8483). Anderson's amendment was adopted (58 Cong. Rec. 8519) by a voice vote and at 58 Cong. Rec. 8690, by a record vote. By its adoption as a substitute for the Webster amendment, the Webster amendment was rejected. The Senate version of the bill contained anti-strike provisions (59 Cong. Rec. 146). In Conference the House version prevailed in this respect (59 Cong. Rec. 3260, 3262). In Conference, the bill was explained as follows (59 Cong. Rec. 3262):

"The House bill contained no enforcement provisions but relied on the voluntary observances by the parties of all decisions made by them. The Senate amendment made extensive use of criminal penalties * * * for any person who entered into a conspiracy to restrain the operation of trains in interstate commerce. The Conference bill contained no penalty provisions for violation of decisions of the Railway Labor Board * * *".

Congressman Esch in explaining the bill stated (59 Cong. Rec. 3270):

"There is nothing in the conference bill of an anti-strike character."

Congressmen asserted that Congress had no power to pass any anti-strike legislation because such legislation would in actual effect deprive workingmen of any real voice in determining their wages, hours or working conditions, and therefore impose involuntary servitude (67 Cong. Rec. 4702-4703, 4705-4723).

The proponents of the Railway Labor Act stated that it preserved the right to strike and would therefore supersede any state law abolishing the right to strike. Thus, during the debates on the floor of Congress in 1926, preceding the adoption of the Railway Labor Act, Congressman Mead stated (67 Cong. Rec. 4721):

It in no way interferes with the right of any individual state, because it deals with the great interstate-commerce function, thus in no way interfering with the sovereign rights of the several states, but if any state is so far backward as to pass anti-strike legislation and force men to work in interstate commerce, it should interfere with such a law. There should be no such state law in free America.

Congressman Shafer, speaking a few minutes later, stated (67 Cong. Rec. 4723):

Any legislation having for its object the prevention of individual or collective refusal to work is unjust and unconstitutional. * * * As a workman has no defense against an oppressive employer except the threat to leave or the actual leaving of his employment, it would be manifestly unfair and extremely unjust to deprive him of that right. In short, when a worker leaves his employment, individually or collectively, he exercises only his right to elect upon what terms he may give his labor. To interfere with his right would take away his liberty and freedom and make him a slave.

The Labor Management Relations Act by Sections 206-210 prescribes a course of action which may be followed by the

President of the United States whenever he is of the opinion that (Section 206):

"a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, * * *

In the contingency of a national emergency such as is described in the above language quoted from Section 206, the President is authorized to appoint a board of inquiry "to ascertain the facts with respect to the causes and circumstances of the dispute" (Section 207 (a)). After the President receives a report from the board of inquiry he may direct the Attorney General to secure an injunction restraining a strike or lockout, where the court finds that such threatened or actual strike or lockout (Section 208 (a)):

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety; it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

After the issuance of the injunctive order the President is required to reconvene the board of inquiry and secure another report from it, at the end of a sixty-day period, respecting the current position of the parties and the efforts

which have been made for settlement, including a statement of the employer's last offer of settlement (Section 209 (b)).

The National Labor Relations Board is required within the succeeding fifteen days to take a secret ballot of employees on the question of whether they wish to accept the final offer of settlement made by their employer. The National Labor Relations Board is required to certify the results of this secret ballot to the Attorney General within five days thereafter. The Attorney General is then required to secure a discharge of the injunction and thereupon the President is required to submit to Congress "a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action" (Section 210). These national emergency provisions of the Labor Management Relations Act were recognized by Congress as establishing a cooling off period with a retention by the employees of the right to strike after the exhaustion of the procedure provided in Sections 206-210.

During the disputes leading to the adoption of the Labor Management Relations Act, Congress considered (93 Cong. Rec. A1007, 3512, 3637-3638, 6295) and rejected seizure as a procedure to be utilized in national emergencies (93 Cong. Rec. 3637-3645). In explaining the rejection of seizure Senator Taft stated (93 Cong. Rec. 3835):

Basically, I feel that the committee feels, almost unanimously, that the solution of our labor problems must rest on a free economy and on *free collective bargaining* * * * that means that we recognize a freedom to strike when the question is the improvement of wages, hours and working conditions, when a contract has expired and neither side is bound by a contract. * * * We have considered the question whether the right to strike can be modified. I think it can be modified in cases which do not involve the basic question of wages, hours and working conditions. But if we impose com-

pulsory arbitration, or if we give the Government power to fix wages at which men must work for another year or for two years to come, I do not see how in the end we can escape a collective economy * * * .

If we begin with public utilities, it will be said that coal and steel are just as important as public utilities. I do not know where we could draw the line. So far as the bill is concerned, *we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining.* We have done nothing to outlaw strikes for basic wages, hours and working conditions after proper opportunity for mediation.

We did not feel that we should put into the law, as a part of the collective bargaining machinery, an ultimate resort to compulsory arbitration, or to seizure, or to any other action. We feel that it *would interfere with the whole process of collective bargaining.* If such a remedy is available as a routine remedy, there will always be pressure to resort to it by whichever party thinks it will receive better treatment through such a process than it would receive in collective bargaining, and it will back out of collective bargaining. (Latties supplied.)

This Court has relied upon the above quotation from Senator Taft as showing that the collective bargaining guarantee of the Labor Management Relations Act includes the right to strike and thereby precludes states from enacting anti-strike legislation. In *Bus Employees v. Wisconsin Board*, 340 U. S. 383, the Supreme Court held the Wisconsin Public Utilities anti-strike act unconstitutional and in conflict with the national policy. The Wisconsin Public Utilities Anti-Strike Act was limited in its application to emergencies and had been utilized by the state in national emergencies such as a national telephone strike which included a stoppage of all telephone service within the

State of Wisconsin. This Court there interpreted the Labor Management Relations Act as "preserving collective bargaining as the ultimate method of settling labor disputes even though they reached the magnitude of national emergencies. This Court there stated (at page 394):

And where, as here, the state seeks to deny entirely a federally guaranteed right which Congress itself restricted only to a limited extent in case of national emergencies, however serious, it is manifest that the state legislation is in conflict with federal law.

Like the majority-strike-vote provision considered in *O'Brien*, a proposal that the right to strike be denied; together with the substitution of compulsory arbitration in cases of 'public emergencies,' local or national, was before Congress in 1947. This proposal, closely resembling the pattern of the Wisconsin Act, was rejected by Congress as being inconsistent with its policy in respect to enterprises covered by the Federal Act, and not because of any desire to leave the states free to adopt it.

In *Automobile Workers v. O'Brien*, 339 U. S. 454, this Court had similarly invalidated the Michigan Labor Mediation Law.

The collective bargaining guarantees of the Railway Labor Act are the same as those of the Labor Management Relations Act. Section 2, paragraph 4, of the Railway Labor Act was inserted by the 1934 amendments to that Act. This paragraph begins (45 U. S. C. A. 152(4)):

Employees shall have the right to organize and bargain collectively through representatives of their own choosing.

In *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342, this Court speaking of the above sentence said (at p. 346):

Collective bargaining was not defined by the statute which provided for it, but it generally has been considered to absorb and give statutory approval to the

philosophy of bargaining as worked out in the labor movement in the United States.^a

^aCf. *H. J. Heinz Co. v. NLRB*, 311 U. S. 514, 523-526.

This Court in the *Order of Railroad Telegraphers* case, then proceeded to cite numerous economic texts to show the characteristics of collective bargaining as worked out in the labor movement in the United States (see footnote 7, page 246).

An examination of "the philosophy of bargaining as worked out in the labor movement in the United States" shows that an indispensable ingredient of collective bargaining is the right to strike for better wages, hours and working conditions. And this Court has so held in a case involving the construction of the collective bargaining provisions of the National Labor Relations Act (29 U. S. C. A. 158 (5)). *Automobile Workers v. O'Brien*, 339 U. S. 454, 457.

This Court has often commented on the fact that the collective bargaining provisions of the Railway Labor Act and the National Labor Relations Act are identical in all the respects here relevant and that the cases under one act are authoritative for the construction of the other. As set forth in the above quotation, this Court in the *Telegraphers* case cited and followed the case of *H. J. Heinz Co. v. N. L. R. B.*, 311 U. S. 514, 523, 526, in which this Court upheld resort to economic authorities in order to determine the incidents of collective bargaining for the purposes of the National Labor Relations Act, and also *J. I. Case v. N. L. R. B.*, 321 U. S. 332, applying that method of construction. For other instances in which the Court has relied on cases under one Act for the construction of the other, see *N. L. R. B. v. Jones & Laughlin Co.*, 301 U. S. 1, 33-34, citing *Virginian Ry Co. v. System Federation*, 300 U. S. 515, 548-549; *Medo Photo Supply Corp. v. N. L. R. B.*, 321 U. S. 678, 683-684, citing and relying on the *Telegraphers* case.

For many years prior to the adoption of the Railway

Labor Act it had been clearly understood as part of "the philosophy of bargaining as worked out in the labor movement in the United States" (321 U. S., at p. 346), that the right to strike was an indispensable element of collective bargaining. Thus, as early as April 1909, in an article by John B. Clark, in the *American Economic Association Quarterly*, entitled "The Theory of Collective Bargaining" it is stated (pp. 26, 28):

The strike, sometimes resorted to and at other times held as a possibility, is an indispensable part of collective bargaining * * *

The same author further states (at p. 32):

Where labor unions are strong and widely extended, and where they are judicious in their demands, an anticipation of a strike usually brings the concession without the use of the last resort, the actual strike itself. The more effective strikes become potential rather than actual.

Consistently in the years since 1909 authors describing collective bargaining have commented on the indispensability to the collective bargaining process of the right to strike. See for instance John R. Commons, *Trade Unionism and Labor problems*, 1921, p. 1; E. T. Hiller, *The Strike*, 1928, p. 206; John R. Commons, *The American Federation of Labor*, *Encyclopedia of the Social Sciences*, 1930, Vol. II, pp. 28-29; John A. Fitch, *Strikes and Lockouts*, *Encyclopedia of Social Sciences*, 1934, Vol. XIV, pp. 420 ff.; E. E. Cummins, *The Labor Problem in the United States*, 1935 (2d ed.), pp. 251, 339; Malcolm Keir, *Labor's Search for More*, p. 18; National Labor Relations Board Bull. No. 4, No. 4, *Written Trade Agreements in Collective Bargaining* (Gov't. Print. Off., 1940), pp. 8, 10-11.

David A. McCabe and Richard A. Lester, *Labor and Social Organization*, 1938, pp. 107-108 state:

Few systems of collective bargaining have been established before the workers proved their ability to

conduct a formidable strike, or have been maintained without the occasional use of the strike.

John R. Commons, *Institutional Economics*, 1934, p. 854, states:

* * * Social responsibility is never accepted *effectively* by employers or any other class of individuals, until they are faced by an alternative which seems worse to them than the one they 'willingly' accept. (Italics in original.)

E. E. Cummins, *The Labor Problem in the United States*, 1935 (2d ed.), p. 251, states:

* * * Without the strike it [the union] feels itself defenseless. Some unions, notably the railroad brotherhoods in their infancy, have thought they could get along without strikes but were soon brought to a realization of their folly; and the railroad brotherhoods though they have not actually engaged in many strikes, have on a number of occasions made forcible use of the threat * * *

In National Labor Relations Board, Bull. No. 4, *Written Trade Agreements in Collective Bargaining* (Gov't. Print. Off.; 1940), p. 12, n. 39, it is stated:

The importance of the strike as a potential device is very well illustrated by the case of the railroads. Although there have been no significant strikes upon the railroads since 1926 (the year in which the Railway Labor Act was adopted), the strike vote and authorization continue to be a part of the collective bargaining procedure.

Peaceful relations under these conditions are not to be confused with another type of situation in which strikes are absent. 'Smoldering discontent may exist for a long time without coming to a head. Such discontent is reflected in decreased efficiency and an increased cost of production. Even strikes may be preferable, clearing a surcharged atmosphere and affording a basis for a fresh start. Many an industry which has

had no strikes for years nevertheless has anything but satisfactory industrial relations.' Edwin E. Witte. *The Government in Labor Disputes*, 1932, pp. 3-4.

So well accepted is it today that there can be no real collective bargaining without the right to strike that we find representatives of employers such as Ira Mosher, Chairman of the Executive Committee of the National Association of Manufacturers, testifying to the same effect in 1947 during the hearings before the Senate Committee on Labor and Public Welfare on the Taft-Hartley bill, S. 1126, 80th Cong., 1st Sess., pp. 940, 960. He said:

We have to preserve the right to strike if we are going to have good faith collective bargaining over wages, hours, and working conditions * * *.

A committee of prominent industrialists, labor leaders and government officials recently stated (*Twentieth Century Fund, Labor Committee, Strikes and Democratic Government* (1947), pp. 13-14):

Those processes [the processes of collective bargaining] lose all color of reality if the workers have not the right to reject management's offer and quit, or if management has not the right to refuse the workers' terms and close the plant. It is the overhanging pressure of this right to strike or lockout that keeps the parties at the bargaining table and fixes the boundaries of stubbornness in the bargaining conferences. It sets the limit upon the aggressive and emotional conduct of the negotiations and dominates the situation in the final moments of responsible decision. Unless the negotiating parties are faced with this possibility of a strike or a lockout, and are forced to examine and accept the consequences of their own decision, they are free from the responsibility that makes genuine collective bargaining possible and produces through it creative results.

The Railway Labor Act of 1926, the 1934 amendments thereto, the 1935 National Labor Relations Act and the

1947 Labor Management Relations Act were all based on the premise that the way to protect commerce from obstruction by strikes was not to illegalize strikes for wage, hour and working condition issues but rather to foster collective bargaining backed up by the power of labor to withdraw its services. The legislative background of these statutes reveals that Congress believed that the history of strikes in this country proves that they had occurred repeatedly and would occur repeatedly, irrespective of their legality, unless both employers and employees could go on strike and no court or other governmental agency would interfere. When the latter type of genuine collective bargaining prevailed strikes rarely took place because both parties realized the tremendous gamble they were taking if they did not reach an agreement. See *Virginian Ry. Co. v. System Federation No. 40*, 300 U. S. 515, 553-557.

Hearings before Congressional committees upon the 1934 Railway Labor Act amendments and the first Wagner bill introduced before Congress in 1934 were held concurrently. Debates upon the 1934 Railway Labor Act often contained references to the pending "Labor Disputes" bill, the Wagner bill, which with a few amendments was adopted in 1935 as the National Labor Relations Act (*e.g.*, 78 Cong. Rec. 11717, 11720). The evidence produced before the committees of Congress conclusively established that unless the workingman had the legal right to back up his collective bargaining position with a strike, he was subject to whatever dictatorial terms the employer imposed. No law, nothing restrained the employer. And employers unless restrained by the knowledge that the employees could strike without being restrained by injunctions or criminal penalties became dictatorial. Repeated and almost continual sporadic strikes occurred, always punished by law, but never quenching the universal insistence of the American to have some effective voice in the government of his economic life. Courts in upholding the constitutionality of the National Labor Relations Act and the Railway Labor Act

have adverted to this legislative history and summarized it. See *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33-34, 41-43 and companion cases; *Virginia Ry. Co. v. System Federation No. 40*, 300 U. S. 515, 553-557.

The premise underlying these Congressional enactments is fully supported by the facts in the railroad industry. From 1926 until the outbreak of World War II there was genuine collective bargaining. There was no doubt but that strikes were legal and could not be enjoined. But after World War II broke out the employers became convinced that they could secure governmental aid in preventing any strike on any carrier of any importance or size. The larger carriers ceased good faith bargaining. They went to the bargaining conferences confident they need make no substantial concessions because labor had no imminently effective power to bring economic pressure to bear to secure the desired concessions. Indeed, the carriers have not only adamantly resisted reasonable demands of the type employees in other industries had already asked and secured, but the carriers have begun to make counter demands which would deprive the workers of provisions in their agreements which were won years ago and preserved over the years by genuine collective bargaining. This was illustrated in Mr. Shield's testimony by his reference to the carriers' demands for the right to eliminate from their agreements the provisions now protecting employees from the carriers' arbitrary establishment of interdivisional runs with the attendant harsh effects on employees who would have to move from their homes and have their seniority rights revised adversely (No. 759, Tr. 888-891). The result has been that since the end of the actual hostilities in World War II, we have had an unprecedented number of railroad strikes, actual and threatened.

The foregoing is fully supported by the reports of the National Mediation Board. The number of strikes from 1934 to 1949 appear in the Sixteenth Annual Report of the National Mediation Board, page 6, as follows:

TABLE A. WORK STOPPAGES IN THE RAILROAD INDUSTRY
1934-49

Year	Number of Stoppages	Number of Workers Involved	Man days idle	
			Number	Percent of estimated working time
1934	0	0	0	.0
1935	1	30	60	(¹)
1936	2	590	22,900	(¹)
1937	6	1,100	26,400	(¹)
1938	1	30	130	(¹)
1939	0	0	0	0
1940	1	70	570	(¹)
1941	5	1,160	22,200	(¹)
1942	9	1,340	17,500	(¹)
1943	8	3,270	9,230	(¹)
1944	12	3,240	25,600	(¹)
1945	13	5,790	56,900	0.01
1946	15	356,000	912,000	.20
1947	7	13,900	288,000	.06
1948	12	3,670	108,000	.02
1949	10	49,700	1,180,000	.31

¹ Less than 1/100 of 1 percent

For the two years subsequent to 1949, strikes have continued to increase. In the Sixteenth Annual Report the strikes for the year ending June 30, 1950, are described as follows (p. 3):

During the year, the number of threatened strikes in the transportation industry was greater than in any previous year in the life of the Act.

There were 16 actual-stoppages during that year (*ibid.*, p. 4).

Respecting the next year, the Seventeenth Annual Report of the National Mediation Board states (p. 2):

Fiscal year 1951 saw the largest number of actual work stoppages by rail and air-carrier employees of any year since the Railway Labor Act was passed in 1926, there being 24 such stoppages of record during this period.

The Mediation Board has also given recognition to the interference by the government with the exercise of economic power as a cause of the breakdown of collective bargaining. In its Sixteenth Annual Report the National Mediation Board states (p. 7):

There are situations from time to time where the employees express a deep concern that the employer has operated under a feeling of assurance that they would be protected by the Government against any use of their economic power, and that such feeling has operated to make negotiations an empty gesture.

The facts with respect to the course of bargaining negotiations under the threat of seizure and under actual seizure as evidenced by the record in the railroad case, No. 759 (see pp. , *supra*) give full support to the Congressional assumption that in the long run free and genuine collective bargaining affords the only sound method of settling basic wages, hours and working conditions. There can be no doubt but what seizure prevents genuine collective bargaining. As Mr. Justice Frankfurter so aptly suggested during the course of the oral argument in these cases, the dissatisfaction which workers express after a settlement reached under seizure consists not merely of the usual complaint that they did not get enough but rather expresses their conviction the settlement is not a collectively bargained one.

CONCLUSION .

For the foregoing reasons, we respectfully submit that this Court should decide that the President has no power to seize private property or personal services without a valid Congressional enactment prescribing the purposes, occasions, methods, extent of taking and mode of compensation. We also urge that this Court should decide that Presidential seizures conflict with the expressed will of

Congress that even in grave national emergencies the right to collective bargaining shall be preserved.

Respectfully submitted,

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May 14, 1952.

APPENDIX A.

Pertinent Provisions of the Constitution of the United States

ARTICLE I.

Section 1: *All legislative Powers* herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles Square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State, in which the Same shall be, for the Erection of Forts, Maga-

zines, Arsenals, dock-Yards, and other needful Buildings—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof. * * * *

ARTICLE II.

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

ARTICLE IV.

Section 2. * * * The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

ARTICLE VI.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XIII.

Section 1. * * * Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
 Section 2. Congress shall have power to enforce this article by appropriate legislation.

R

APPENDIX B

Pertinent Provisions of the Labor Management Relations Act, 1947, 29 U. S. C., 141 et seq.

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

Sec. 101. The National Labor Relations Act is hereby amended to read as follows:

“Findings and Policies

“Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

“The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

“Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly ad-

justment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

"Definitions

"Sec. 2. When used in this Act—

"(1) The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include * * * any person subject to the Railway Labor Act, as amended from time to time.

"Rights of Employees

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain

from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a) of this title.

(b) It shall be an unfair labor practice for labor organization or its agents—

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a) of this title;

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *

"Limitations

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

Sec. 206. Whenever in the opinion of the President of the United States a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign

nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

Sec. 207. (a) A board of inquiry shall be composed of a chairman and such other members as the President shall determine, and shall have power to sit and act in any place within the United States and to conduct such hearings either in public or in private, as it may deem necessary or proper, to ascertain the facts with respect to the causes and circumstances of the dispute.

(b) Members of a board of inquiry shall receive compensation at the rate of \$50 for each day actually spent by them in the work of the board, together with necessary travel and subsistence expenses.

(c) For the purpose of any hearing or inquiry conducted by any board appointed under this title, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C. 19, title 15, secs. 49 and 50, as amended), are made applicable to the powers and duties of such board.

Sec. 208. (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to

enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

(b) In any case, the provisions of the Act of March 23, 1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," shall not be applicable.

(c) The order or orders of the court shall be subject to review by the appropriate United States court of appeals and by the Supreme Court upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 29, secs. 846 and 347).

Sec. 209. (a) Whenever a district court has issued an order under section 208 of this title enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this chapter. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

Sec. 210. Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including

the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.

Exemption of Railway Labor Act

Sec. 212. The provisions of this title shall not be applicable with respect to any matter which is subject to the provisions of the Railway Labor Act, as amended from time to time."

APPENDIX C

Pertinent Provisions of the Railway Labor Act (45 U. S. C. 151 et seq.):

Sec. 2 * * * *

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Fourth. Employees shall have the right to originate and bargain collectively through representatives of their own choosing.

Sec. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both

parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

* * *

Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

* * *

Sec. 10. If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: Provided, however, That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and

make a report thereon to the President within thirty days from the date of its creation. . . .

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

APPENDIX D**Executive Order No. 10340****DIRECTING THE SECRETARY OF COMMERCE TO
TAKE POSSESSION OF AND OPERATE THE
PLANTS AND FACILITIES OF CERTAIN STEEL
COMPANIES.**

Whereas on December 16, 1950, I proclaimed the existence of a national emergency which requires that the military, naval, air and civilian defenses of this country be strengthened as speedily as possible to the end that we may be able to repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made throughout the United Nations and otherwise to bring about a lasting peace; and

Whereas American fighting men and fighting men of other nations of the United Nations are now engaged in deadly combat with the forces of aggression in Korea, and forces of the United States are stationed elsewhere overseas for the purpose of participating in the defense of the Atlantic Community against aggression; and

Whereas the weapons and other materials needed by our armed forces and by those joined with us in the defense of the free world are produced to a great extent in this country, and steel is an indispensable component of substantially all of such weapons and materials; and

INDISPENSABLE TO PROGRAMS

Whereas steel is likewise indispensable to the carrying out of programs of the Atomic Energy Commission of vital importance to our defense efforts; and

Whereas a continuing and uninterrupted supply of steel is also indispensable to the maintenance of the economy of the United States, upon which our military strength depends; and

Whereas a controversy has arisen between certain companies in the United States producing and fabricating steel and the elements thereof and certain of their workers represented by the United Steel Workers of America, CIO, regarding terms and conditions of employment; and

Whereas the controversy has not been settled through the processes of collective bargaining or through the efforts

of the Government, including those of the Wage Stabilization Board, to which the controversy was referred on December 22, 1951, pursuant to Executive Order No. 10233, and a strike has been called for 12:01 a.m., April 9, 1952; and

Whereas a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field; and

Whereas in order to assure the continued availability of steel and steel products during the existing emergency, it is necessary that the United States take possession of and operate the plants, facilities, and other property of the said companies as hereinafter provided:

ORDERED AS FOLLOWS

Now, therefore, by virtue of the authority vested in me by the Constitution and laws of the United States, and as President of the United States and Commander in Chief of the armed forces of the United States, it is hereby ordered as follows:

1. The Secretary of Commerce is hereby authorized and directed to take possession of all or such of the plants, facilities, and other property of the companies named in the list attached hereto, or any part thereof, as he may deem necessary in the interests of national defense; and to operate or to arrange for the operation thereof and to do all things necessary for, or incidental to, such operation.

2. In carrying out this order the Secretary of Commerce may act through or with the aid of such public or private instrumentalities or persons as he may designate; and all Federal agencies shall co-operate with the Secretary of Commerce to the fullest extent possible in carrying out the purposes of this order.

3. The Secretary of Commerce shall determine and prescribe terms and conditions of employment under which the plants, facilities, and other properties possession of which is taken pursuant to this order shall be operated. The Secretary of Commerce shall recognize the rights of workers to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining, adjustment of grievances, or other mutual aid or protection, provided that such activities do not interfere with the operation of such plants, facilities, and other properties.

ORDINARY COURSE OF BUSINESS

4. Except so far as the Secretary of Commerce shall otherwise provide from time to time, the managements of the plants, facilities, and other properties possession of which is taken pursuant to this order shall continue their functions, including the collection and disbursement of funds in the usual and ordinary course of business in the names of their respective companies and by means of any instrumentalities used by such companies.

5. Except so far as the Secretary of Commerce may otherwise direct, existing rights and obligations of such companies shall remain in full force, and effect, and there may be made, in due course, payments of dividends on stock, and of principal, interest, sinking funds, and all other distributions upon bonds, debentures, and other obligations, and expenditures may be made for other ordinary corporate or business purposes.

6. Whenever in the judgment of the Secretary of Commerce further possession and operation by him of any plant, facility, or other property is no longer necessary or expedient in the interest of national defense, and the Secretary has reason to believe that effective future operation is assured, he shall return the possession to the company in possession and control thereof at the time possession was taken under this order.

7. The Secretary of Commerce is authorized to prescribe and issue such regulations and orders not inconsistent herewith as he may deem necessary or desirable for carrying out the purposes of this order; and he may delegate and authorize subdelegation of such of his functions under this order as he may deem desirable.

HARRY S. TRUMAN.

THE WHITE HOUSE

April 8, 1952.

APPENDIX E

Executive Order No. 10141

POSSESSION, CONTROL AND OPERATION OF THE
TRANSPORTATION SYSTEM OF THE CHICAGO,
ROCK ISLAND & PACIFIC RAILROAD COMPANY.

WHEREAS I find that as a result of labor disturbance there are interruptions, and threatened interruptions, of the operations of the transportation system owned or operated by the Chicago, Rock Island & Pacific Railroad Company; that it has become necessary to take possession and assume control of the said transportation system for purposes that are needful or desirable in connection with the present emergency; and that the exercise, as hereinafter specified, of the powers vested in me is necessary to insure in the national interest the operation of the said transportation system..

NOW, THEREFORE, by virtue of the power and authority vested in me by the Constitution and the laws of the United States, including the act of August 29, 1916, 39 Stat. 619, 645, as President of the United States and Commander in Chief of the Armed forces of the United States, it is hereby ordered as follows:

1. Possession control, and operation of the transportation system owned or operated by the Chicago, Rock Island & Pacific Railroad Company (hereinafter referred to as the company) are hereby taken and assumed, through the Secretary of the Army (hereinafter referred to as the Secretary) as of four o'clock, Eastern Standard Time, July 8, 1950; but such possession and control shall be limited to real and personal property and other assets used or useful in connection with the operation of the said transportation system.

2. The Secretary is directed to operate or to arrange for the operation of, the transportation system taken pursuant to this order in such manner as he deems necessary to assure to the fullest possible extent continuous and uninterrupted transportation service.

3. In carrying out the provisions of this order the Secretary may act through or with the aid of such public or private instrumentalities or persons as he may designate,

and may delegate such of his authority as he may deem necessary or desirable. The Secretary may issue such general and special orders, rules, and regulations as may be necessary or appropriate for carrying out the provisions, and to accomplish the purposes, of this order. All Federal agencies shall comply with the orders of the Secretary issued pursuant to this order and shall cooperate to the fullest extent of their authority with the Secretary in carrying out the provisions of this order.

4. The Secretary shall permit the management of the company to continue its managerial functions to the maximum degree possible consistent with the purposes of this order. Except so far as the Secretary shall from time to time otherwise provide by appropriate order or regulation, the board of directors, officers, and employees of the company shall continue the operation of the said transportation system, including the collection and disbursement of funds thereof, in the usual and ordinary course of the business of the company, in the name of the company, and by means of any agencies, associations, or other instrumentalities now utilized by the company.

5. Except so far as the Secretary shall from time to time otherwise determine and provide by appropriate order or regulation, existing contracts and agreements to which the company is a party shall remain in full force and effect. Nothing in this order shall have the effect of suspending or releasing any obligation owed to the company, and all payments of such obligations shall be made to the company by the persons obligated to the company. Except as the Secretary may otherwise direct, there may be made, in due course, payments of dividends on stock and of principal, interest, sinking funds, and all other obligations; and expenditures may be made for other ordinary corporate purposes.

6. Until further order of the President or the Secretary, the said transportation system shall be managed and operated under the terms and conditions of employment in effect on June 24, 1950, without prejudice to existing equities or to the effectiveness of such retroactive provisions as may be included in the final settlement of the dispute between the company and the workers. The Secretary shall recognize the right of the workers to continue their membership in labor organizations, to bargain collectively through

representatives of their own choosing with the representatives of the company, subject to the provisions of applicable law, as to disputes between the company and the workers; and to engage in concerted activities for the purpose of such collective bargaining or for other mutual aid or protection, provided that in his opinion such concerted activities do not interfere with the operation of the transportation system taken hereunder.

7. Except as this order otherwise provides and except as the Secretary may otherwise direct, the operation of the transportation system taken hereunder shall be in conformity with the Interstate Commerce Acts, as amended, the Railway Labor Act, as amended, the Safety Appliance Act, the Employers' Liability Acts, and other applicable Federal and State Laws, Executive orders, local ordinances, and rules and regulations issued pursuant to such laws, Executive orders, and ordinances.

8. Except with the prior written consent of the Secretary, no receivership, reorganization, or similar proceeding affecting the company shall be instituted; and no attachment by mesne process, garnishment, execution, or otherwise shall be levied on or against any of the real or personal property or other assets of the company.

9. The Secretary is authorized to furnish protection for persons employed or seeking employment in or with the transportation system of which possession is taken hereunder; to furnish protection for such transportation system; and to furnish equipment, manpower, and other facilities or services deemed necessary to carry out the provisions, and to accomplish the purposes, of this order.

10. From and after four o'clock, Eastern Standard Time, on the eighth day of July, 1950, all properties taken under this order shall be conclusively deemed to be within the possession and control of the United States without further act or notice.

11. Possession, control, and operation of the transportation system, or any part thereof, or of any real or personal property taken under this order shall be terminated by the Secretary when he determines that such possession, control, and operation are no longer necessary to carry out the provisions, and to accomplish the purpose, of this order.

HARRY S. TRUMAN.

THE WHITE HOUSE

April 8, 1950

APPENDIX F**Executive Order No. 10155****POSSESSION, CONTROL, AND OPERATION
OF CERTAIN RAILROADS.**

WHEREAS, I find that as a result of labor disturbances there are interruptions, and threatened interruptions, of the operations of the transportation systems owned or operated by the carriers by railroad named in the list attached hereto and made a part hereof; that it has become necessary to take possession and assume control of the said transportation systems for purposes that are needful or desirable in connection with the present emergency; and that the exercise, as hereinafter specified, of the powers vested in me is necessary to insure in the national interest the operation of the said transportation systems:

Now, THEREFORE, by virtue of the power and authority vested in me by the Constitution and the laws of the United States, including the acts of August 29, 1916, 39 Stat. 619, 645, as President of the United States and as Commander in Chief of the armed forces of the United States, it is hereby ordered as follows:

1. Possession, control, and operation of the transportation systems owned or operated by the carriers by railroad named in the list attached hereto and hereby made a part hereof are hereby taken and assumed, through the Secretary of the Army (hereinafter referred to as the Secretary), as of 4 o'clock PM Eastern Standard Time, August 27, 1950; but such possession and control shall be limited to real and personal property and other assets used or useful in connection with the operation of the transportation systems of the said carriers. If and when the Secretary finds it necessary or appropriate for carrying out the purposes of this order, he may, by appropriate order, take possession and assume control of all or any part of any transportation system of any other carrier by railroad located in the continental United States.

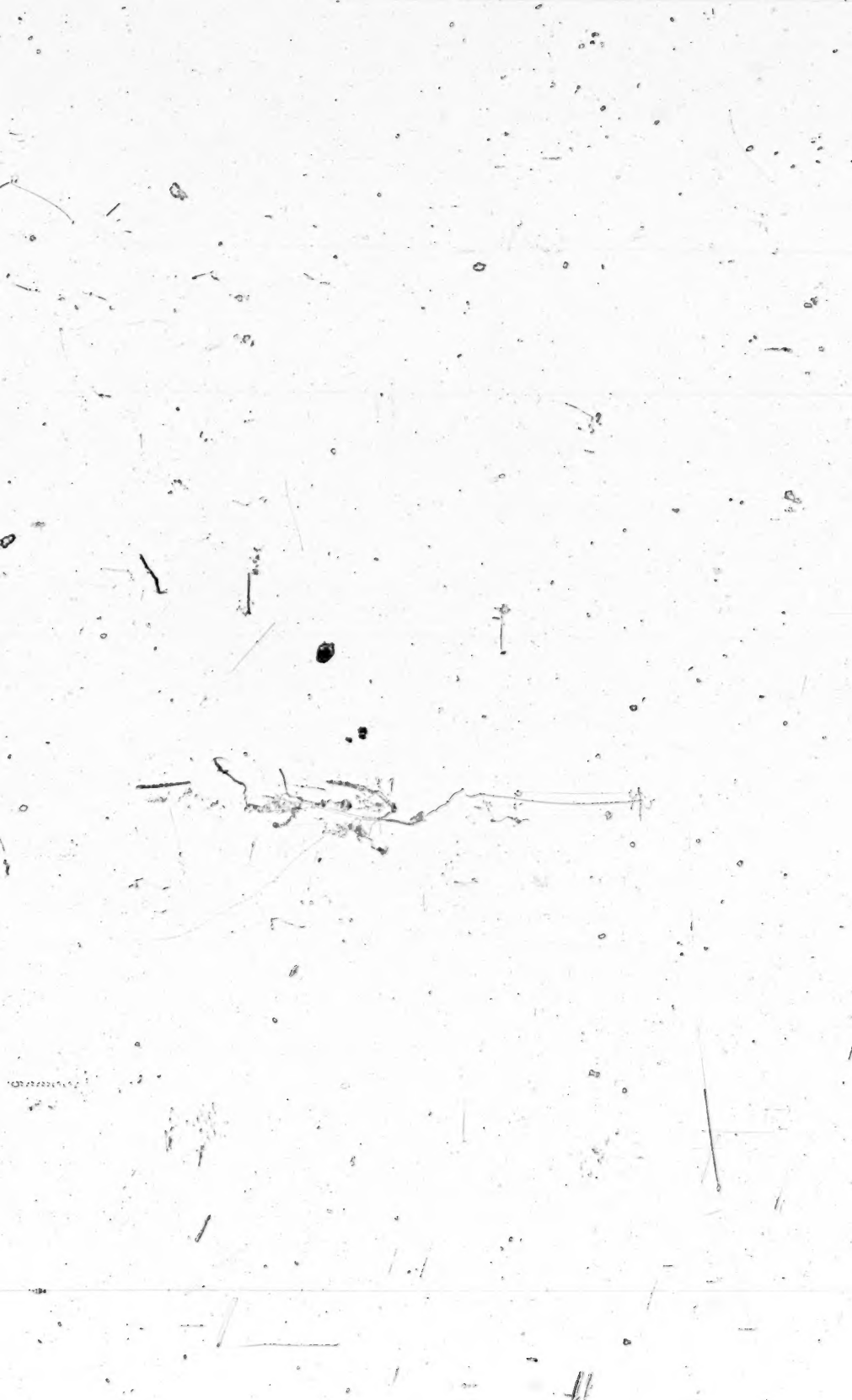
2. The Secretary is directed to operate, or to arrange for the operation of, the transportation systems taken under, or which may be taken pursuant to, this order in such manner as he deems necessary to assure to the fullest possible extent continuous and uninterrupted transportation service.

3. In carrying out the provisions of this order the Secretary may act through or with the aid of such public or private instrumentalities or persons as he may designate, and may delegate such of his authority as he may deem necessary or desirable. The Secretary may issue such general and special orders, rules, and regulations as may be necessary or appropriate for carrying out the provisions, and to accomplish the purposes, of this order. All Federal agencies shall comply with the orders of the Secretary issued pursuant to this order and shall cooperate to the fullest extent of their authority with the Secretary in carrying out the provisions of this order.

4. The Secretary shall permit the management of carriers whose transportation systems have been taken under, or which may be taken pursuant to, the provisions of this order to continue their respective managerial functions to the maximum degree possible consistent with the purposes of this order. Except so far as the Secretary shall from time to time otherwise provide by appropriate order or regulation, the boards of directors, trustees, receivers, officers, and employees of such carriers shall continue the operation of the said transportation systems, including the collection and disbursement of funds thereof, in the usual and ordinary course of the business of the carriers, in the names of their respective companies, and by means of any agencies, associations, or other instrumentalities now utilized by the carriers.

5. Except so far as the Secretary shall from time to time otherwise determine and provide by appropriate orders or regulations, existing contracts and agreements to which carriers, whose transportation systems have been taken under, or which may be taken pursuant to, the provisions of this order are parties, shall remain in full force and effect. Nothing in this order shall have the effect of suspending or releasing any obligation owed to any carrier affected hereby, and all payments shall be made by the persons obligated to the carrier to which they are or may become due. Except as the Secretary may otherwise direct, there may be made, in due course, payments of dividends on stock, and of principal, interest, sinking funds, and all other distributions upon bonds, debentures, and other obligations; and expenditures may be made for other ordinary corporate purposes.

6. Until further order of the President or the Secretary, the said transportation systems shall be managed and oper-



ated upon the terms and conditions of employment in effect on August 20, 1950, without prejudice to existing equities or to the effectiveness of such retroactive provisions as may be included in the final settlement of the disputes between the carriers and the workers. The Secretary shall recognize the right of the workers to continue their membership in labor organizations, to bargain collectively through representatives of their own choosing with the representatives of the owners of the carriers, subject to the provisions of applicable law, as to disputes between the carriers and the workers; and to engage in concerted activities for the purpose of such collective bargaining or for other mutual aid or protection, provided that in his opinion such concerted activities do not interfere with the operation of the transportation systems taken hereunder, or which may be taken pursuant hereto.

7. Except as this order otherwise provides and except as the Secretary may otherwise direct, the operation of the transportation systems taken hereunder, or which may be taken pursuant hereto, shall be in conformity with the Interstate Commerce Act, as amended, the Railway Labor Act, as amended, the Safety Appliance Acts, the Employers' Liability Acts, and other applicable Federal and State laws, Executive orders, local ordinances, and rules and regulations issued pursuant to such laws, Executive orders, and ordinances.

8. Except with the prior written consent of the Secretary, no receivership, reorganization, or similar proceeding affecting any carrier whose transportation system is taken hereunder, or which may be taken pursuant hereto, shall be instituted; and no attachment by mesne process, garnishment, execution, or otherwise shall be levied on or against any of the real or personal property or other assets of any such carrier; provided that nothing herein shall prevent or require approval by the Secretary of any action authorized or required by any interlocutory or final decree of any United States court in reorganization proceedings now pending under the Bankruptcy Act or in any equity receivership cases now pending.

9. The Secretary is authorized to furnish protection for persons employed or seeking employment in or with the transportation systems of which possession is taken hereunder, or which may be taken pursuant hereto; to furnish protection for such transportation systems; and to furnish

equipment, manpower, and other facilities or services deemed necessary to carry out the provisions and to accomplish the purposes of this order.

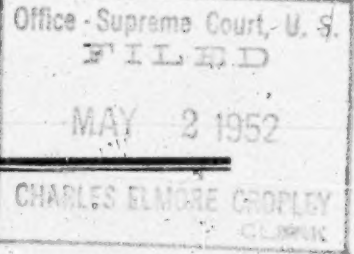
10. From and after 4 o'clock PM Eastern Standard Time on the said 27th day of August 1950, all properties taken under, or which may be taken pursuant to, this order shall be conclusively deemed to be within the possession and control of the United States without further act or notice.

11. Possession, control, and operation of any transportation system, or any part thereof, or of any real or personal property taken under, or which may be taken pursuant to, this order shall be terminated by the Secretary when he determines that such possession, control, and operation are no longer necessary to carry out the provisions and to accomplish the purposes of this order.

(s) HARRY S. TRUMAN.

THE WHITE HOUSE
August 25, 1950.

Nos. 744 and 745



IN THE

Supreme Court of the United States

October Term, 1951

CLERK
COURT, U.S.
SUP.

CHARLES SAWYER, SECRETARY OF COMMERCE,

Petitioner,

v.

**THE YOUNGSTOWN SHEET AND TUBE COMPANY,
ET AL.**

**BRIEF FOR THE UNITED STEELWORKERS OF AMER-
ICA, CIO AS AMICUS CURIAE WITH REGARD TO
THE ISSUANCE OF A STAY**

ARTHUR J. GOLDBERG
General Counsel

**THOMAS E. HARRIS,
DAVID E. FELLER,
ELLIOT BREDHOFF,**
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BRIEF FOR THE UNITED STEELWORKERS OF AMERICA, CIO AS AMICUS CURIAE WITH REGARD TO THE ISSUANCE OF A STAY

CONSENT TO FILE

This brief *amicus curiae* is filed pursuant to Rule 27 of the Court's Rules. The consent of all parties in each of these cases to the filing of this brief has been filed with the Clerk.

INTEREST OF THE UNION

The United Steelworkers of America, CIO (hereinafter called the Union), represents the employees of the steel companies who are parties to this case. Under the National Labor Relations Act, it is the exclusive representative of such employees for the purposes of collective bargaining in respect to "rates of pay, wages, hours of employment or other conditions of employment." This Court's disposition of the petitions for certiorari now before it will, of course, have a

significant effect upon the Union and its membership. But of immediate importance to the Union is the Court's decision as to the terms of a stay of execution of the order of the District Court. Decision on that issue will directly affect and can, indeed, completely destroy the Union's statutory responsibility to bargain for its membership.

THE ISSUE BEFORE THE COURT

Both the Government and the steel companies have petitioned this Court to grant a writ of certiorari. The only immediate issue between the parties is as to the terms of the stay of execution of the order of the District Court.

The Court of Appeals, after argument *en banc*, issued a stay of execution, which will expire if certiorari is granted by this Court. The Government, in its petition in No. 745, has applied to this Court for an order continuing that stay, in the event that certiorari is granted, until final disposition by this Court on the merits.

The companies, petitioners in No. 744, on the other hand, oppose the grant of any such stay. Furthermore, if a stay is issued, the companies request the Court, as they unsuccessfully did in the Court of Appeals, to include therein a provision preventing any changes in the terms and conditions of employment pending final disposition of the case. This brief is filed in opposition to this request of the companies.

ARGUMENT

I

If the Court should extend the stay of execution heretofore issued by the Court of Appeals but reverse that Court and modify the stay in the manner requested by the companies, the effect on the United Steelworkers of America and the employees whom it represents would be immediate and irreparable. It would place the employees in a position, for the duration of this litigation, much more disadvantageous than the position they would occupy if either the Government or the steel companies were eventually to prevail.

The contracts between the United Steelworkers of America and the steel companies involved here expired on December

31, 1951. From that date, the Union was free to bargain with the employers as to all matters concerning wages and conditions of employment. The Union did not lose this right when the Secretary of Commerce, acting in the name of the United States, seized the properties of these companies. If this seizure was valid, the Union and its members had the right to deal with their employer, the United States, as to conditions of employment. If this seizure is to be terminated and the properties of the companies returned, the Union and its members will have the right to bargain with their employers—the companies. Regardless of who is in possession of the properties involved, the Union would have the right and, indeed, the duty to negotiate concerning not only wages but also all of the myriad factors comprehended under the words “conditions of employment.”

The modification of the stay order requested by the companies would destroy that right. If granted, the Union would be rendered impotent to bargain with its current employer. The employer, under the terms of the stay order, would be the Government. But the employer would be forbidden to perform the essential attributes of his position with respect to his employees.

If the stay order is granted in the form requested by the Government, the Union can bargain with the Government. If, as the companies request, it is denied completely, the employees can bargain with the steel companies. But if the stay order is granted but modified as the companies request, the Union will have no employer with which it can bargain. It would thus be deprived of rights which it would have if the companies prevail and rights which it would have if the Government prevails. It would be left, in short, in the middle and holding the bag.

Contrariwise, of course, the effect of a stay modified as requested by the companies would be to place the companies in a position more favorable than any they could achieve if the litigation were finally determined in their favor. The position of the companies from the beginning has been that there should be no change in wages or working conditions. The dispute with the Union arose from the Union's proposals

for increases in wages and changes in working conditions. The issuance of a stay order, conditioned as requested by the companies, now would have the effect of requiring the Government to enforce for the duration of this litigation the entire position of the companies.

We respectfully suggest to this Court that the companies are suggesting action to the Court which would constitute an intervention on the side of the companies in their dispute with the Union. It would give the companies temporary relief both against a strike and against an increase in wages, relief which the companies will have no right to receive even if they are completely successful in this litigation. And it will give the companies this relief at the sole expense of the employees whom the Union represents.

The companies assert that the *status quo* should be maintained. But a stay order modified as requested by the companies would not preserve the *status quo*. It would effectively destroy the Union's right to bargain on wages—a right which the Union possessed before the seizure, which it possessed after the seizure and which it will possess when this litigation is terminated. Judge Pine's order did not destroy that right. A stay of that order will not destroy it. But an order that no changes in wages and working conditions be made *pendente lite* will destroy it. It will maintain the status of the companies by destroying the status of the Union. This is hardly a maintenance of the *status quo*.

II

We have shown, we think, that the insertion in the stay of the condition sought by the steel companies, that the Secretary of Commerce be prohibited from effecting changes in the terms and conditions of employment in the steel plants, would be both unjust and highly injurious to the workers and to the Union. The steel companies, we submit, have not shown that they would suffer any comparable injury, or, indeed, any injury at all if the stay were continued on its present terms.

The steel companies assert that unless the stay is modified as they request, they will suffer irreparable injury because

(1) their funds may be used to pay increased wages and other benefits; (2) they will have no remedy against the Government for this injury; and (3) they will suffer damages not susceptible of monetary measurement because their bargaining position with the Union will be adversely affected.

As to the first of these assertions, it seems to rest on the steel companies' assumption that if the Government had not seized the plants, those plants would nevertheless still be in operation. The events of the last few days should have made it clear, even to the steel companies, that this assumption is erroneous. But for the seizure the steel mills would be closed, as they were during the period between Judge Pine's decision and the Court of Appeals' issuance of its stay.

The steel companies have not shown, and quite obviously cannot show, that they would be worse off financially with their plants operating under wages and working conditions agreed to between the Government and the Union than they would be with their plants struck because of the refusal of the workers to continue to work under the 1950 wages and working conditions. It is true that Judge Pine, in the course of his opinion, asserted, "and without burdening this opinion with the recital of facts, that the damages are irreparable" (R. 85). Several comments may be made with regard to this "finding":

(1) Judge Pine went on to say that he doubted whether the finding was necessary anyway since in his opinion the Government's actions were illegal (R. 85).

(2) Judge Pine assumed that if the mills were turned back to the steel corporations the workers would continue to work under 1950 wages and working conditions (R. 86).

That assumption was wrong. Events showed that the Government was correct in asserting that the alternatives were either operation by the Government with power to negotiate current wages and working conditions, or no operation. Assuming these to be the alternatives, as we must, the companies have shown no damage.

At least four members of this Court have indicated their agreement with this position. In his dissenting opinion in

the Court of Claims in the *Pewee Coal Case*, Judge Madden declared:

"This extra expense consisted of an increased vacation allowance to the plaintiff's workmen, and the refund to them of occupational charges like rentals on mine lamps. The court has not found that the plaintiff [company] could have operated its mine without making the concessions directed by the War Labor Board, nor has it found what the losses to the plaintiff would have been if the Government had not intervened and the strike had continued. I think that the court is not justified in awarding the plaintiff the amount of these expenditures when it does not and, I think, could not, find that the plaintiff was, in fact, financially harmed by the Government's acts." 88 F. Supp. at page 431, 115 Ct. Cl. at pages 678-679.

In this court, the four dissenting judges explicitly declared their agreement with these views. 341 U. S. 114, at 122. Mr. Justice Reed disagreed. The opinion of the remaining four members of the court rested on another ground and did not indicate their views on this subject.

(3) A reading of Judge Pine's opinion conveys the over-all impression that the injury which really moved Judge Pine to issue the injunction was not the supposed financial injury to the steel companies but the alleged injury to the public "which would flow from a timorous judicial recognition that there is some basis for this claim" that the Government had power to seize the mills (R. 86).

(4) Finally, Judge Pine refused to issue just the sort of order which the companies are now proposing, viz. leaving the Government in nominal possession but forbidden to make any changes in the terms and conditions of employment. One of the companies had requested Judge Pine to issue such an order but he declared that he was unwilling to do so because of "its stultifying implications" (R. 86).

With the companies' assertion that they have no adequate remedy against the United States for the damages they will

will suffer no damages, and, second, because this contention is more appropriately dealt with by the Government.

The steel companies' final assertion with respect to their supposed injuries is that they will suffer damages not susceptible to monetary measurement because their bargaining position viz-a-viz the Union when the plants are returned to them may be injured by any changes in wages or working conditions made by the Government during the period of Government possession. The short answer to this argument is that when the mills are restored to their possession they will have the right and it will again be their duty to bargain with the Union concerning the then current wages and working conditions. The assertion that their relative bargaining position may be detrimentally affected by the wages and working conditions which have been in effect between the Government and the Union in the meantime is a tenuous and speculative basis for asking this court to deprive the Union of all right to bargain with its employer during the period of this litigation.

Respectfully submitted,

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Nos. 744 and 745

Office - Supreme Court, U. S.

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CHARLES ELMORE CROPLEY

CLERK

IN THE

Supreme Court of the United States

LIBRARY
SUPREME COURT
October Term, 1951

CHARLES SAWYER, SECRETARY OF COMMERCE,

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INDEX

	Page
Consent to File	1
Introduction	1
Argument	2
I. The powers of the President; whatever they may have been, to seize the steel industry on April 8, 1952, were not limited or diminished by the fact that he did not then invoke the injunctive procedures of the Taft-Hartley Act.	2
The Situation in December, 1951	3
Events of December 22, 1951-April 8, 1952	10
Conclusion	12
II. The steel dispute giving rise to the emergency of April 8, 1952, was a price dispute between the government and the industry	14
III. The court should, with the greatest expedition possible under the circumstances, dispose of the case in such a way as to avoid any continuation of the status now obtaining	18
Appendix A—Statement by the President to the representatives of the steel companies and the Steelworkers Union, Saturday, May 3, 1952	24

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**BRIEF FOR THE
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CONSENT TO FILE

This brief *amicus curiae* is filed pursuant to Rule 27 of the Court's rules. The consent of all parties in both No. 744 and No. 745 has been obtained.

INTRODUCTION

The United Steelworkers of America, CIO (hereinafter called the Union), as the representative of the employees of the plaintiff steel companies, has a vital interest in this proceeding. The Union, however, does not intend in this brief to urge upon the Court any particular resolution of the equitable and constitutional arguments presented by the parties. In accordance with the spirit of Rule 27, the Union will limit its brief to the consideration of issues as to which the Union believes it can provide material which will be of assistance to

the Court in disposing of the ultimate questions here involved.

The questions as to which we believe we are in a position to aid the Court in its disposition of this case are these:

(1) The availability of an 80-day "cooling off" injunction under the Taft-Hartley Act, as an alternative to Presidential seizure;

(2) The nature of the dispute giving rise to the emergency of April 8, 1952;

(3) The status of the parties to the steel dispute pending disposition of this case.

These issues have all been raised by the parties to the litigation in the course of arguing the basic constitutional question here involved. As to each of them the Union has a special interest and, we believe, a special viewpoint.

ARGUMENT

I

The powers of the President, whatever they may have been, to seize the steel industry on April 8, 1952, were not limited or diminished by the fact that he did not then invoke the injunctive procedures of the Taft-Hartley Act.

In the argument of this case below special emphasis was placed by the plaintiffs upon the alleged availability of a Taft-Hartley injunction on April 8, 1952, as an alternative method of preventing a stoppage of work in the steel industry and thus avoiding the peril to the national defense involved in the cessation of the production of steel. The argument of the plaintiff companies seemed to have two branches. The first branch of the argument was that Congress had provided a method in the Taft-Hartley Act for handling emergencies of the nature of the one here involved and that this method, once provided, constituted an implied limitation upon the power of the President to use alternative methods for dealing with the situation. The second branch of the argument seemed to be that the existence of the Taft-Hartley remedy meant that there was no emergency which would give rise to the exercise of Presidential authority under the Constitution, since such power can be used only where there are no other

methods of dealing with the emergency. This branch of the argument amounts to saying, in effect, that an emergency did not *really* exist on April 8, 1952. The emergency which caused the President to act, it was argued by the companies, was created by his own failure to use procedures of the Taft-Hartley Act.

Both branches of this argument are incorrect on their faces. The Taft-Hartley remedy is not mandatory. It is not exclusive. And, even if available, it would have been ineffectual to prevent an immediate stoppage of steel production at midnight April 8, 1952. We assume, however, that the Solicitor General, in his argument, will fully deal with these points. Our purpose in this brief is to demonstrate that both branches of the argument rest on a false premise.

The hidden premise on which the companies' argument basically rests is that the decision to use or not to use the Taft-Hartley procedures had to be made, for the first time, with reference to the impending stoppage in steel production at midnight, April 8, 1952. The stoppage on April 8 is the stoppage which, the companies assert, should have been prevented by the President by use of the Taft-Hartley procedures. The stoppage on April 8 is the emergency which, the companies argue, existed only because of the President's failure to invoke the Taft-Hartley procedures.

This entire argument ignores the fact that the kind of crisis which the Taft-Hartley Act was designed to deal with first arose not in April, 1952, but in December, 1951. By forgetting the December crisis and focussing the inquiry solely on what happened in April *after* the President's action in December, the companies ask a false question—and get a false answer.

The Situation in December, 1951.—The situation in December 1951 was this: The Union's contracts with the employers in the industry were to expire on December 31. During the prior negotiations, the Union had made, as stated in affidavits filed in this case (R. 59), more than a hundred proposals for changes to be included in new contracts. No substantial concessions on any of these proposals had been made by the companies. The services of the Mediation and Conciliation Serv-

ice provided for under the Taft-Hartley Act had been invoked and had failed. A strike was about to occur. It was a strike which would affect an entire industry and would, presumably, imperil the national health or safety.

Under Sections 206-210 (29 U.S.C. §§ 176-180) of the Taft-Hartley Act, the President is given authority in such situations to appoint a board of inquiry to investigate the facts with respect to such a dispute. After such a board is appointed and reports to the President, the President is authorized to direct the Attorney General to seek an injunction against the strike. This injunction lasts for 80 days. At the termination of this 80-day period, the Act requires that the injunction be discharged, and the parties are free to engage in whatever action—including a resumption of the strike—they believe appropriate.

The 80-day injunction provided for under Taft-Hartley is supposed to be a "cooling off" injunction. It is an extra 80-day period of delay added on to the normal period for resolution of labor contract disputes. Under Section 8(d) (1) of the Act, the parties are required to give 60 days notice of any proposed termination or modification of a collective bargaining contract. 29 U.S.C. 158(d) (1). If the dispute is not settled within 30 days, additional notices to the Federal Mediation and Conciliation Service are required by Section 8(d) (3), so that the Service may intervene to aid in a settlement prior to the expiration of the contract. If agreement is not reached by the contract termination date, a strike will ordinarily occur. Only in the special "emergency" cases covered by Sections 206-210 is there any additional delay. In such cases, an injunction can be obtained which will add another 80 days for negotiation after the expiration of the contract, in the hope that the parties can, in that period, resolve their differences.

This procedure was presumably available to the President, to deal with the impending shutdown of steel production on December 31, 1951. If the President had invoked it, the strike would have been delayed for a period of 80 days. A board of inquiry would have reported upon the facts of the dispute and the contentions of the parties. Finally, if the dispute were not settled during the period of injunction the President

would have been required to submit to the Congress a report of what had taken place with whatever recommendations as to action which he might see fit to make.

But this was not the only procedure available. The President, by executive order, had the power to set up still other procedures to handle disputes of this nature. And the President had in fact established such procedures. The reason for their establishment is probably best suggested in the Second Annual Report of the Federal Mediation and Conciliation Service, issued December 31, 1949, in which the following is stated, not with reference to a period of national emergency, because none existed at that time, but with respect to strikes of great magnitude during normal times:

"... although the national emergency provisions of the Labor Management Relations Act, 1947, give assurance of 80 days of work and production, they do not provide procedures which give sound and substantial promise of inducing settlement during the period of the injunction. During that period there is little or no incentive to bring the dispute to a conclusion. The prevailing tendency is to await the discharge of the injunction at which time the parties are free to employ their economic weapons of strike or lock-out.

"It would seem that the continuance of work and production for 80 days or any other period might be assured in some national emergency disputes without the necessity of resorting to the injunctive process or other methods of compulsion. There are available for use procedures which go beyond mediation, as discussed here, and fall short of the compulsion inherent in injunction decrees and seizure orders. Most unions and employers, unable to arrive at agreement through collective bargaining before a deadline date, particularly where a stoppage will have serious national consequences, may well be willing to defer the use of economic force until a respected impartial board, to be appointed either by the President or the Director of the Federal Mediation and Conciliation Service, has an opportunity to hear the parties and make recommendations for a fair settlement. Unions and employers negotiate through representatives who are not always in full control or mastery of the situations in which they find themselves. Sometimes they are the prisoners or victims of their own tactics and strategy. Recommenda-

tions by a disinterested body which sharpen and narrow the issues and suggest fair and equitable terms of settlement of a dispute which appears to the parties to be insoluble on the deadline date may provide them with a happy solution to an impasse. Face-saving and prestige is at least as important in industrial disputes as it is in other types of disputes. The recommendations of such a board, although not binding on the parties, can be expected to have the force of public opinion behind them to encourage compromise and settlement. The public, though not technically a disputant at the bargaining table, is a party in interest in a real and important sense.

"These observations should not be taken as constituting a proposal that the Chief Executive refrain from acting under the national emergency provisions of the Act on occasions when the protection of the national safety or health require that he do so. I am suggesting, however, the use of voluntary procedures which seem to be well designed to encourage settlement and which, although they may be regarded as going beyond normal mediation techniques, fall far short of the compulsion associated with the injunction decrees and seizure orders. I am aware of no statutory bar to officials of the Federal Government proposing such procedures for the voluntary settlement of a labor dispute. Such procedures, of course, could only be effective where there is a practical assurance that the employer and the union will cooperate by maintaining the status quo for a sufficient period of time to enable the board to conduct its hearings, hand down its recommendations, and afford the Federal Mediation and Conciliation Service an adequate opportunity thereafter, to bring the parties to agreement on the basis of the recommendations. As indicated above, moreover, those procedures should be used only in cases of the greatest magnitude and importance to the national interest. Their employment in lesser cases would be destructive of collective bargaining in that the parties might be encouraged to pass off their responsibilities to a board. I do not suggest, of course, that this procedure be used in every important dispute that may occur. Its employment depends on the facts of the case. There is no simple formula for handling all labor-management disputes." 2d Annual Report, Federal Mediation and Conciliation Service (1949) pp. 7-8.

Acting in accordance with the suggestion contained in the report, and upon the recommendation of the President's

visory Committee on Mobilization Policy, the President had established, by Executive Order 10233 (16 Fed. Reg. 3503), a disputes procedure which could be used with respect to disputes seriously affecting the progress of the national defense.

¹The scope of the WSB procedures is considerably different from that of the Taft-Hartley provisions. But in a case such as the steel dispute either was applicable.

The relationship between the two is clearly set forth in the following testimony of Dr. George Taylor, the then Chairman of the Wage Stabilization Board, before the House Committee on Banking and Currency in connection with the 1951 amendments to the Defense Production Act:

"MR. TAYLOR. . . . The Taft-Hartley procedure is something quite different from the Board's.

"It gives the President discretion to deal in a particular way with certain special labor disputes. Before the President can invoke these powers, there has to be a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, or the production of goods for commerce. This strike or lock-out, actual or threatened, must be one which would imperil the national health or safety if permitted to continue or to occur. Only under these circumstances will the President invoke these procedures. If these conditions are met he may appoint a Board of Inquiry with compulsory powers to inquire into disputes, find the facts, and report their findings to him.

"The Wage Stabilization Board machinery, on the other hand, is to be used whenever the President believes a labor dispute 'substantially threatens the progress of the national defense effort.' Circumstances dictate procedures, and the circumstances and the interest threatened calling for the use of one procedure or the other are entirely different. In any event, nothing in our procedures impairs the President's power of discretion to resort to the Labor-Management Relations Act. From an industrial relations viewpoint, it is clear that the two procedures are essentially separate and distinct from beginning to end.

"During this period, when we are preparing for our national defense, we must use all the tools of achieving agreement at our command. These techniques include collective bargaining, and the negotiations that go with it, conciliation and mediation, the national emergencies procedures of the Labor-Management Relations Act, and the new machinery which I have just described.

"The question has been asked as to what the Board would do if a dispute involving a stoppage of production were referred to it by the President. While I can speak only for myself, I wish to make very clear what my position would be in that situation. I would recommend to the Board:

"First, that it do everything in its power to obtain an immediate resumption of production. Second, that the Board take no action concerning the merits of the dispute until that end was attained.

"Thus to meet the problem raised by a new kind of labor dispute—disputes affecting the defense effort—a new kind of machinery, closely geared to the defense effort and preserving voluntarism to a maximum degree, has been established. As such, it provides labor, management, and ultimately the public with a widened choice of technique, a new instrument, for the settlement of labor disputes in a mobilization period." (Hearings before the Commit-

This was a voluntary procedure. It required, first, that the President certify the dispute to the Wage Stabilization Board as one which "substantially threatens the progress of national defense." Secondly, under the Board's own rules, it required that the Union voluntarily agree to postpone or call off its strike for the period of the Board's deliberations and that both parties voluntarily agree to present their sides of the dispute to the Board. If those conditions obtained, the Board would take the case and, after consideration of the merits of the dispute, would make recommendations as to fair and equitable

tee on Banking and Currency, House of Representatives (82d Cong. 1st Sess.) on H. R. 3871, p. 306).

"MR. TAYLOR. . . . I think the Taft-Hartley procedures are usable by the President within his discretion just as always.

"MR. COLE. I understand they are usable, I understand they are usable. The question is, Will they be used? In that connection, you say that this is not inconsistent with the Taft-Hartley procedure?

"MR. TAYLOR. I don't believe it is.

"MR. COLE. Let's assume that it is not inconsistent, but is it your judgment that even though it ~~were~~ not inconsistent, it might still be a different and new and completely unusual procedure which might supersede the Taft-Hartley law?

"MR. TAYLOR. As I understand the Taft-Hartley procedure the President is given the discretion, where there is an industry-wide problem, or one affecting substantially a part of an industry to take certain steps. As I understand it, it is discretionary.

"I think you can have another type of dispute, which typically grows out of the needs of a defense program, a dispute which substantially interferes with the production program, or words to that effect. It is an entirely different kind of labor dispute which is referred to.

"Your question as to whether there is overlapping, it seems to me, that there are two separate tools in a defense program which is new, new kinds of problems, you have a new tool which can be used for a new kind of situation. I think it is discretionary in both cases. How the President will utilize them, I, of course, wouldn't say. It is within his discretion." (*Id.*, at pp. 312-313.)

"In the present dispute in the oil industry, the President certified the dispute to the Board on March 6, 1952. The unions involved agreed to submit the dispute to the Board. Some of the companies, however, refused to participate in the Board proceedings. 29 Labor Relations Reporter 284. Hence the Board returned the case to the parties on April 16, 1952 (29 Labor Relations Reporter 296), and a strike ensued.

In another case, covering a large portion of the country's copper mining industry, the Mine, Mill and Smelter Workers refused to call off their strike. In accordance with its policy, the Board refused to hear the case and the President invoked the injunctive provisions of the Taft-Hartley Act.

It should be noted that in the steel case, unlike the copper and oil cases, both the Union and the companies agreed to submit their side of the dispute to the Board and cooperated fully in the Board proceedings.

terms of settlement consistent with the Government's wage stabilization policies.

The power of the President to establish such an alternative procedure was never seriously questioned in the Congress. Indeed, subsequent to the establishment of the WSB dispute procedures, a bill was introduced in the House which would have prohibited any governmental agency from dealing with labor disputes except as specified in Congressional enactments. It specifically removed from the Wage Stabilization Board the disputes procedures which the President had established. The bill (H. R. 4552, 82nd Cong., 1st Sess.) was offered as one of the proposed 1951 amendments to the Defense Production Act of 1950. It was fully debated on the House floor and resoundingly defeated. 97 Cong. Rec. (daily ed.) 8606. A similar amendment was introduced in the Senate by Senator Taft (97 Cong. Rec. (daily ed.) 7592) but was withdrawn in view of the House action. It is clear that Congress was fully aware of the alternative procedures established by the President and, in the face of this knowledge, defeated an attempt specifically to deny to him the use of such alternatives.

The situation in December, 1951, then, was this: The President presumably could have invoked the "cooling off" provisions of the Taft-Hartley Act. If he had done so a court of equity would have been empowered to issue an 80-day injunction against the impending strike. A Board of inquiry would have been appointed, with authority to investigate the facts but without the power to make recommendations. If the 80-day "cooling off" period failed to produce a settlement there was no terminal facility. On the other hand, the dispute procedures of the Wage Stabilization Board were available. Under these procedures there would not be an injunction. However, under the rules of the Wage Stabilization Board the parties would have to agree voluntarily to preserve the status quo and put off the strike while the Board investigated the dispute. The Board would be empowered to investigate the facts, but unlike the Taft-Hartley board, it would have power to make recommendations. Finally, if these recommendations did not result in settlement there would be, as in the case of

Events of December 22, 1951-April 8, 1952.—The President had a choice in December 1951. He presumably could have obtained an injunction against the strike under the Taft-Hartley Act, or he could ask the Union to enjoin itself and submit the case to the Wage Stabilization Board. If the President had, at that date, ignored both procedures and seized the industry, the argument which the companies now make might be apposite. But he did not. For reasons which must be obvious from the report of the Mediation and Conciliation Service quoted above the President chose the WSB alternative. It has never been suggested by anyone in this litigation that in making this choice between alternative remedies the President violated any statutory or constitutional restrictions.

What happened? The first question was whether the Union would voluntarily agree to postpone its strike. We want the Court to understand that this was a serious question to the Union. If we refused, the President might use the Taft-Hartley Act. If he did, we might be restrained from striking for 80 days. But at the end of that period we would be free of all Government restraint. We would thus avoid the risk of having our demands subjected to compromise by a board empowered to make recommendations. We could look forward, at the end of the 80-day period, to the use of our full economic power in support of *all* of our original demands. From the viewpoint of the Union's selfish interest there was much to recommend this course of action.

On the other hand, the President had asked us on behalf of the country to submit our dispute to the Wage Stabilization Board. The loss of steel production which would necessarily be involved in any strike which we might undertake at the end of the Taft-Hartley period might be avoided if a solution to the dispute could be achieved on the basis of recommendations made by the Wage Stabilization Board.

We have no hesitation in telling this Court that the issue thus posed to the Union was a difficult one to resolve. If we would refuse we would retain our maximum bargaining position. But on the other hand to refuse would be to ignore the request of the President of the United States and the needs of the defense program.

The Union made its choice. The President had certified the case to the Board on December 22, 1951. After five days of deliberation the Union, on December 27, determined to defer its strike until January 3, 1952, at which time the matter could be further considered by a Special International Convention which had been called for that date. The Union's Special Convention, composed of 2,500 delegates from all over the country, determined, after two days of debate, to comply with the President's request and to postpone the strike while the case was being considered by the Wage Stabilization Board. And so, on January 4, 1952, the strike was postponed.

The case went to the Wage Stabilization Board. The Board conducted lengthy hearings in January and February, 1952. The Union, which had originally postponed its strike only until February 24, 1952, was faced with the necessity of further deferring its action at that time since the Board had not completed its consideration of the case. On February 21, 1952, the Union again deferred its strike to March 23, 1952. On March 20, 1952, the Wage Stabilization Board issued its report and recommendations for the settlement of the dispute. There was not time to conduct negotiations on the basis of those recommendations before March 23, 1952. So again, in response to a request from the Chairman of the Wage Stabilization Board, the Union deferred its strike, setting a deadline of April 8, 1952.

The net effect of all these postponements was that, at the request of the Government, the Union had voluntarily enjoined itself from striking for a period of 99 days, a period well in excess of the 80-day "cooling off" period which would have been provided if the President had invoked the Taft-Hartley procedures rather than the Wage Stabilization Board procedures in December. Every objective of the Taft-Hartley Act had been fulfilled. There had been a cooling off period—indeed a longer cooling off period than is provided for under the Taft-Hartley law. There had been an investigation into the dispute by a Board—indeed, the Board, through its recommendations, had done more than was possible under the Taft-Hartley law to provide a basis for settlement of the dis-

pute. At this point, the procedures that were invoked having failed to produce a settlement, the Union had no alternative but to strike.

Conclusion.—In view of this background it is the veriest nonsense to state that the President was obliged to invoke the procedures of the Taft-Hartley law on April 8. The situation which the Taft-Hartley law was designed to meet—the breakdown of negotiations at the end of the statutorily required period for negotiations—had already occurred and had already been met in a way which went beyond the remedies available under Taft-Hartley. It is ridiculous to suggest that, this procedure having been followed through to the end, the Union should have been required to start all over again under the Taft-Hartley law, with a new board of inquiry again investigating the merits of a dispute which had already been thoroughly investigated over a three month period by the Wage Stabilization Board. The stultifying nature of any such action—to borrow a word from Judge Pine—was exposed by the suggestion, made by counsel for Bethlehem Steel in oral argument both before the District Court and the Court of Appeals, that the President could have avoided the delays in the Taft-Hartley procedure by appointing the Wage Stabilization Board itself as the board of inquiry under the Taft-Hartley law.

We do not contend, be it noted, that in no case would the President have power to invoke the Taft-Hartley emergency procedures after the WSB procedures have been exhausted. We do contend, however, that under the circumstances here present, where the principle objectives of the Taft-Hartley procedures had already been accomplished, the President's refusal to start the merry-go-round again was fully justified. Indeed, we believe that the court of equity to which any request for an injunction would have been addressed, in the exercise of the discretionary powers which are given to it under the Act, would have refused to issue an injunction for these very same reasons.

One more point should be noted. Until the steel dispute arose, the Wage Stabilization Board has been quite successful in averting or stopping interruptions of production in industries

vital to the national defense. Except in one case^a the unions involved in disputes certified by the President to the Wage Stabilization Board had voluntarily postponed or called off their strikes and in each case, prior to the steel case, the Board's recommendations had provided a basis upon which the parties were able to settle their dispute without any interference in production for national defense.

These results were achieved because both labor and industry generally recognized the usefulness of the WSB procedures. In particular, the unions who were asked to postpone their strikes did so in the national interest because they recognized that they would not be required utterly to surrender the rights of their membership in so doing.

All of this might have been destroyed in a single stroke if the President had used the Taft-Hartley procedures against the union *after* the Union had voluntarily submitted to the Wage Stabilization Board procedures and agreed to accept its recommendations. No union, conscious of its responsibilities to its membership, would thereafter consent to voluntary submission to the Wage Stabilization Board. If the Taft-Hartley delay was to be imposed in any event there would be no reason for a union first to subject itself voluntarily to the greater delay involved in Wage Board consideration of the case. Furthermore, it may reasonably be assumed that no self-respecting labor organization would consent to serve upon a tripartite Wage Stabilization Board under such circumstances.

The course of action proposed by the companies as an alternative to the action which the President took on April 8, therefore, would have involved an immediate danger that the government's entire tripartite Wage Stabilization Board machinery would collapse. It is easy simply to say that the President should have invoked Taft-Hartley on April 8, 1952. We submit that it is somewhat harder to say that the President had a constitutional duty to destroy a major portion of the government's stabilization machinery in order so to do.

For all of these reasons, we believe that, irrespective of what may have been the powers of the President with respect

^a The copper case referred to *supra*, n. 2.

to seizure on April 8, 1952, those powers cannot be considered as limited or diminished by virtue of the fact that he did not invoke the discretionary injunctive provisions of the Taft-Hartley Act against the Union at that time.

II

The steel dispute giving rise to the emergency of April 8, 1952, was a price dispute between the government and the industry.

In the memoranda submitted by the parties in the District Court, issue was joined as to whether the Presidential action of April 8, 1952 was "to settle a labor dispute," as contended by the companies, or "to insure the uninterrupted production of steel," as contended by the Government. We think that the two come to the same thing if it is necessary to settle a labor dispute in order to insure the uninterrupted production of steel. But the issue as posed is misleading. It assumes that the dispute here was between management and labor, with the Government interested in its settlement only because of the nation's need for steel.

This is not the case. As one of the parties to the labor dispute we know that it could have been settled long before April 8, 1952, were it not for the existence of an underlying dispute between the steel companies and the Government as to the price of steel. This is now a matter of public record. On April 16, 1952, in testimony before the Banking and Currency Committee of the House of Representatives, which was referred to in an affidavit filed in this case (R. 73), the following colloquy took place between Senator Pastore of Rhode Island and the Director of the Office of Price Stabilization:

"MR. ARNALL. . . . So, as far as I know, this is the first crowd that came in and said, 'We want a price increase. We demand a price increase.'

"SENATOR PASTORE. As a matter of procedure, do you mean to tell me that collective bargaining negotiations of the CIO hinged upon what your agency would have done in allowing them to raise the prices first?"

"MR. ARNALL. Senator Pastore, I regret to say it, I am embarrassed to say this, but the truth of it is that

the entire wage negotiations have been based upon what we do in price increases for steel. The reason those negotiations have broken down is because we will not agree to a commensurate price increase to offset the labor cost." (Transcript of Hearing on S. 2999 (82d Cong., 2d Sess.) Senate Committee on Labor and Public Welfare, pp. 150-151.)

The merits of the various contentions of the parties to the wage dispute between the companies and the Union, and of the price dispute between the companies and the Government, may not be relevant to the resolution of the issues before this Court. The fact that the price dispute between the Government and the industry was the basic cause of the impending shutdown of steel production on April 8, 1952, is, perhaps, relevant.

Let us suppose that the facts in this case were that there was no wage dispute, that the steel companies had simply asked the Government to revise its price regulations so as to raise the ceiling set for steel under the Defense Production Act of 1950, as amended. Suppose that the Government's price stabilization agency had refused to comply with this request to alter its regulations and, as a result, the companies threatened to halt the production of steel. Suppose that the President of the United States, in response to this threat, took seizure action by Executive Order and the companies sought to enjoin this action.

That is, in substance, the posture of the present case. It is true that the industry did not directly threaten the government with a shutdown of steel production. It did not have to. By withholding its consent to the compromise recommendations of the Wage Stabilization Board it could create a situation in which the Union would be forced to strike and, thus, accomplish the same result.

It is no answer to say that the Union could have refrained from striking. Its members had suffered a cut in real wages amounting to about 16 cents per hour since the last negotiated settlement with the steel industry. Simply to acquiesce in the maintenance of the *status quo*, as proposed by the companies, would have meant self-destruction for the Union.

The situation, then, was this. The companies would settle

with the Union. But they would only do so if the government amended its price regulations in favor of the steel companies. If the government refused, a strike would occur and the production of steel would stop.

This was clearly brought forth at hearings held by the House Committee on Banking and Currency on May 2, 1952, at which Mr. Arnall, Mr. Putnam, Administrator of the Economic Stabilization Agency, and Mr. Bullen, Vice Chairman of the Wage Stabilization Board, testified together. At that hearing, the following colloquy took place:

"MR. BOLLING. They [the steel companies] are not in principle opposed to the wage increase as you see the situation?

"MR. ARNALL. They are not in principle opposed in any way to the wage increase, and have so told me.

"MR. PUTNAM. I think, to put it another way, if I may, Congressman Bolling, I think the issue here is whether they get special and different treatment from every other industry or whether they abide by the same rules that all other industries abide by. I think that is the issue."

"MR. BOLLING. Would it be too strong a statement to make to say that the steel companies in this situation are in effect using their economic power, as the producers of a basic element in our domestic and defense economies, to bargain, not with the steelworkers' union, but with the people of the United States, to obtain a concession which is not otherwise justified?

"MR. ARNALL. In my judgment, they have no issue with the Union. They are making a lot of talk about it. But their issue is with the Government. They figure they have got the Government across a barrel, and they are going to extort this price increase, or wreck the economy. Let me make it that simple."

"MR. WOLCOTT. Are you going to let that statement rest on the record, that the steel industry wants to wreck the economy?

these price increases are granted, the economy will be wrecked, because they won't produce steel." (Transcript of Hearing, Vol. III, pp. 401-404.)

All of the alleged negotiations between the companies and the Union were a sham. Time and again in our conferences with companies in the industry we were told that settlement with the Union would depend on the outcome of other negotiations going on elsewhere. Those negotiations, the real negotiations, took place between the companies and the government on the price issue. As a direct result of the Government's refusal to give in to the companies in those negotiations the industry would have shut down at midnight on April 8, 1952.

We recognize that, in the present state of the record, it may be impossible for the Court to make any finding as to the basic cause of the emergency with which the country was faced on the night of April 8, 1952. We think, however, that material of which the Court can take judicial notice makes it clear that there is at least a reasonable question as to whether the basic controversy was a labor controversy between this Union and the plaintiff companies, or a controversy over price regulations between the government and the industry. Therefore, we submit, at the very least, the Court should not decide the basic constitutional questions here involved on the assumption, made but not proved by the companies, that the purpose of the Executive Order 10340 was "to settle a labor dispute."

'It is the Union's firm conviction that the companies deliberately avoided making any offers which might have produced an agreement with the Union in order that they might generate a crisis which would force the Government's hand on prices. Thus, during the negotiations with the Union in November and December, 1951, the companies did not offer a single cent in wages or fringe benefits even though it was obvious that under even the most strict and anti-labor interpretation of the Wage Board's regulations the Union was entitled to some wage increase. Any litigant can be expected to offer to settle before adjudication on the terms which would result if he prevailed in the litigation. But the steel companies refused to offer anything prior to submission to the Wage Board—not even the amount eventually proposed by the industry representatives on the Board.

The reason, the Union believes, is plain. If a satisfactory offer were made, it might be accepted. If it were accepted, there would be an agreement. And if there were agreement there would be no crisis and no way in which the industry could apply pressure on the Government for a change in the price regulations applicable to steel.

III

The court should, with the greatest expedition possible under the circumstances, dispose of the case in such a way as to avoid any continuation of the status now obtaining.

As a result of the terms of the stay issued by this Court on May 3, 1952, the following situation prevails: The Secretary of Commerce, acting in the name of the United States, is in nominal possession of the steel-producing properties of the plaintiff companies. He is forbidden, however, to make any changes in the terms and conditions of employment prevailing at those properties without the consent of the companies. The heads of the companies are continuing to operate them precisely as they did before. The processes of procurement, production and sales are not being interfered with in the slightest. And the profits resulting from these operations continue to accrue to the private owners.

There is only one significant change from the situation prevailing prior to the seizure. That change is a drastic alteration, for the time being, of the balance of power in the collective bargaining relationship. Collective bargaining can have substance only if the possibility exists that the Union can use its economic strength in support of its proposed changes in the terms and conditions of employment. This does not mean that collective bargaining necessarily entails strikes. It does mean that, without the possibility of a strike, the Union has no bargaining power and, hence, there is no incentive for the companies to bargain.⁵

⁵ "In genuine collective bargaining . . . the possibility of a strike or lockout is . . . an ever-present and controlling factor in the realistic processes of collective bargaining. Those processes lose all of reality if the workers have not the right to reject management's offer and quit, or if management has not the right to refuse the workers' terms and close the plant. It is the overhanging pressure of this right to strike or to lockout that keeps the parties at the bargaining table and fixes the boundaries of stubbornness in the bargaining conferences . . . Unless the negotiating parties are faced with this possibility of a strike or a lockout, and are forced to examine and accept the consequences of their own decision, they are free from the responsibility that makes genuine collective bargaining possible and produces through it creative results. Thus, for the ordinary labor dispute, the possibility of a strike or lockout is, in the last analysis, the most potent instrument of persuasion."

To the extent that the possibility of use of the strike weapon is lessened in periods of national emergency such as the present, collective bargaining can be expected to succeed only if there is some substitute for the diminished threat of economic conflict. The procedures of the Wage Stabilization Board established by the President, as well, presumably, as the Board of Inquiry provided for under the Taft-Hartley Act, were designed to introduce into the collective bargaining picture the power of public opinion as an inducement to settlement of emergency disputes. When the pressure of public opinion is unsuccessful, as it has been in this case, then other forms of inducement must be resorted to. In the absence of any pressures for a settlement it may safely be assumed that no settlement will be reached.

It is for this reason that we urged the Court, in our brief *amicus curiae* with respect to the terms of the stay, not to condition that stay upon the maintenance of the terms and conditions of employment now in effect at the plants of the plaintiff companies. We said that, by so doing, the Court would deprive us of an employer with which we could deal and that so to do would be manifestly unfair. The companies responded to this suggestion by stating that the Union always could deal with the companies and that, under the terms of the Executive Order here involved, precisely this kind of bargaining was anticipated. Apparently this argument prevailed.

That issue having been decided against us, we do not intend to re-argue it here. But we should make it clear that the effect of that decision has been to preserve the Union's right to bargain in form but to render it meaningless so long as the case is pending in this Court.

We said above that the possibility of a strike gave meaning to the process of collective bargaining. Just so, in the present situation only the possibility that the Government would make changes in terms and conditions of employment gave substance to the collective bargaining discussions of the parties to the dispute. This does not mean that the Union would welcome any change in wages or working conditions imposed by the Government, any more than the Union welcomes a

dictation from the Government. But only when the possibility of Government action existed was there any reasonable probability that the dispute could be settled by bargaining between the parties.

This was shown most dramatically in the collective bargaining conferences which the President convened at the White House on May 3, 1952. It has already been stated accurately in the press that in those sessions, for the first time since this dispute began, there were indications that a negotiated settlement might be reached. In convening the conferences, the President addressed the participants in no uncertain language. He said flatly that unless an agreement were reached the Government would immediately undertake to make unilateral changes in the terms and conditions of employment. He added that the proposed action would not be satisfactory to either party. Upon this premise, the companies both proceeded to bargain with the Union in a way which gave genuine promise that a solution would be achieved.

The announcement of the Court's stay order on the afternoon of May 3, abruptly changed the course of negotiations. Where there had been promise of a settlement before that announcement, there now was none. The conferences finally terminated on Sunday, May 4th, with no agreement having been concluded. We do not think that we had legally lost the right to strike. But as a Union conscious of our responsibilities and our position in the nation, we did not engage ourselves in a strike against the Government of the United States.

The Court undoubtedly acted as it did in the light of the well-established judicial procedure of maintaining the status quo in all particulars pending the termination of a

* A copy of the President's statement of May 3 is printed in Appendix A to this brief for the convenience of the Court.

¹ *United States vs. United Mine Workers*, 330 U. S. 258, often cited in this connection, holds only that the Norris-LaGuardia Act is inapplicable as a jurisdictional bar to injunction proceedings during periods when the Government stands in the position of employer. It does not hold that government seizure alone creates a cause of action against a strike which is otherwise lawful. The strike involved in the Mine Workers case was presumed unlawful because in violation of a contract. There is in this case no contract and, so far as we are aware, no basis upon which to argue that a strike against the employer would

litigation. But we think these facts underline the urgent need that the Court terminate the present status as quickly as possible. So long as that status continues, there is in fact no possibility that the steel dispute can be settled by negotiation. Once the status is changed, by decision either in favor of the Government or in favor of the plaintiff companies, the forces which tend to induce agreement by the parties will again be free to operate and it is our earnest hope that those forces will induce agreement.

We want to emphasize the fact that the Union wants a negotiated, not a dictated, agreement. That has been our position from the beginning. The companies have told the Court in their affidavits on record in this case that there are hundreds of issues involved in this dispute. These issues involve such matters as seniority, hours of work, safety, grievance procedure, the details of the arbitration machinery, and others. With respect to almost all of these issues, as well as the wage items, it is the Union which desired to change the pre-existing collective bargaining contract and it was the companies which desired to retain the status quo. Most of these issues were returned by the Wage Stabilization Board to the parties for negotiation without recommendation.* With respect to these issues, therefore, it is clear to the Union that no settlement imposed by the Government can be satisfactory. And these issues, although not involving major monetary considerations, are of great importance to the Union and its membership. For this reason, as well as for the reason that the Union profoundly prefers a negotiated settlement to an imposed one, the Union does not look forward to governmentally imposed changes in wages and working conditions. But in the absence of any power in the Government to make such changes there is not the slightest incentive for the companies to reach agreement with us.

The position of the companies in this dispute from the beginning has been that the status quo should be maintained. Every day in which it is so maintained represents the possibility of

* With respect to the only major contractual issue on which both the Union and management sought changes from the status quo—management rights, the Board recommended that no changes be made.

net gain to them. It is not merely for them a question of putting off the day of settlement. Although the Board has recommended retroactivity as to wages, we have as yet no agreement on that subject. Our members are still working at 1950 wages and paying 1952 prices. Each day in which this situation continues may thus represent a substantial net gain for the companies. The urgency in the present situation therefore, is not simply a desire to know at the earliest possible time how the controversy will terminate. It may well represent a substantial difference in the living standards of our members.

Under these circumstances, we urge the Court most respectfully to dispose of the present litigation with the utmost speed. We recognize, of course, that serious and important constitutional questions are here presented. The opinion of the Court in this litigation may constitute a landmark in the history of American jurisprudence. We therefore should not be understood as urging the Court to deal cavalierly or with undue haste with these serious issues in order to serve the needs of the moment. We urge the Court, rather, to adopt a device frequently used in the Court's history and most recently used in the case of *Ray v. Blair*, No. 649 this Term, that is, to announce its decision and enter its judgment as promptly as is reasonable under the circumstances after argument has been concluded, reserving for later filing the opinion or opinions of the members of the Court. If this device be adopted the present unhealthy and unfair situation can speedily be terminated without sacrifice of the necessity for careful consideration of the Court's opinion on the constitutional issues involved. If this suggestion does not meet with the Court's approval and if the Court feels that the grave nature of the issues requires extended deliberation before any decision is announced, we then respectfully urge the Court to modify the terms of its stay upon the conclusion of oral argument herein.

Some injustice may be the price which has to be paid for orderly adjudication of important constitutional issues. We think it is a little unfair that the price should be paid entirely by the steelworkers of America. It is being so paid so long

as the present status continues. Hence, with all due respect we urge the Court to take whatever action it deems appropriate at the earliest possible time.

Respectfully submitted,

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APPENDIX A**STATEMENT BY THE PRESIDENT TO THE REPRESENTATIVES OF THE STEEL COMPANIES AND THE STEELWORKERS UNION, SATURDAY, MAY 3, 1952.**

I have asked you to meet here today to reach agreement on the issues in dispute between you.

As President of the United States, representing all the people of the country, I have two principal interests in this matter.

First, it is absolutely necessary, for the safety of the country, that steel production must continue during the emergency.

I cannot reveal, even to you people here, the exact situation with regard to the supply and production of military items. I can only say, on the considered advice of the officials in charge of our defense program, that the safety of our troops fighting in Korea, and the safety of our nation in the present world crisis, depend on the uninterrupted production of steel.

Second, it is essential to the economic health of our country and the welfare of our people that wage and price increases in the steel industry shall be held within the limits of sound stabilization policies.

A runaway inflation in this country could wreck our economy and impose terrific hardship on millions of families.

These are heavy stakes. And they impose an equally heavy responsibility on everyone of you to act in the national interest.

Because of the vital importance of uninterrupted production of steel, I was forced three weeks ago to direct the Secretary of Commerce to operate the mills. That action is now being challenged in the courts, as is entirely proper. None of us know how soon it will be decided.

In the meantime, the mills are under Government operation.

I have said many times that the idea of Government operation of the steel plants is thoroughly distasteful to me. I have

either. I want it ended as quickly as possible. The best, the quickest, and the most equitable way for this to be done is for the companies and the Union to bargain out the issues in dispute and agree on a settlement.

That is what I am asking you to do now. And I am asking you, as the head of the greatest government in the world, to get down on earth and talk to each other without any ill feeling, and to get this thing done.

I am sure you are aware that the Government has been considering what are fair and reasonable wages and working conditions for the employees during the period that the plants remain under Government operation.

Two weeks ago, the Secretary of Commerce asked the Economic Stabilization Administrator to prepare recommendations for changes in terms and conditions of employment in the steel industry at this time. Those recommendations have now been completed, and the Government will be prepared on Monday morning, or as soon as we can get ready, to order changes in terms and conditions of employment to be put into effect.

I do not want the Government to have to fix terms and conditions of employment. That is your job, not ours. If we must take action it will be something that is not satisfactory to either side. But we will have no choice if you cannot agree.

I consider it extremely unfortunate that the Government may find itself in a position where it has to fix the terms and conditions of employment in an industry.

However, the purpose of these meetings is not to discuss terms and conditions of employment during Government operation. The purpose is to try to reach an agreement between the parties so that Government operation can be brought to an end.

In these meetings, you have the opportunity to settle this dispute as it should be settled. You can reach agreement if you have the will to do so.

Days and weeks have already been spent in negotiations. You know which points are the crucial ones. You know this matter *can* be settled in a few hours.

In the interest of your country, for the welfare of the United States, and for the welfare of the world, I am asking you to make that settlement.

We all know that a big issue in this whole controversy is the steel companies' claim for higher prices as a result of any wage increase that might be agreed upon. As I have said on a number of occasions, there is only one proper way to settle this entire controversy. First, the parties should reach agreement on the issues in dispute between them. Then, the companies should present their claims for price increases to the proper Government officials.

On their part, the stabilization officials of the Government are prepared to consider the steel companies' claims on their merits, and to make sure that the steel companies receive whatever price adjustment they are entitled to under the law.

Gentlemen, the eyes of the nation are upon you as you meet here in the White House today. You represent two powerful economic groups who have contributed immeasurably to the greatness of our country. You have great power; and, because of that fact, you all have great responsibility. You have achieved your strength in a democracy which places its faith in the ability of its people to work out their own problems as reasonable men in the national interest. I urge you to reaffirm that faith by settling your differences now in this time of critical national need.

This room—the President's Cabinet Room—is yours for these meetings. Some great decisions affecting the welfare of our country have been made in this room. Your agreement on a settlement of this dispute would rank with any of them as a contribution to the common defense and the general welfare of our nation.

I am asking John Steelman to sit with you, to help you in trying to reach an agreement, and to keep me constantly ad-

Now gentlemen, I have never felt as strongly about anything as I do about this situation. We have a national defense program which is right on the verge of success.

For seven years, from April 12, 1945, until now, I have spent my whole time trying to keep this country out of a third world war.

If we can get the economic situation and the defense situation in Western Europe through to a successful conclusion, and that depends on steel, if we can get the situation in the Far East settled on a basis that is fair to all concerned, I am just as sure as I sit here that we'll get a world peace. And with the development of the world after that world peace, there won't be a chance for our industry to catch up with the demand.

Then that means the welfare of labor; it means the welfare of industry. I don't think any of you can complain about the situation of the economy at the present time. There's been a fair distribution of profits; there's been a fair distribution of earnings; there's been a fair distribution of the farm income. All of you are more prosperous than you have ever been in the history of this country.

Never in the history of the world has there been an economic situation that equals it, and you gentlemen can't afford to upset that situation over a private quarrel between labor and industry.

I want you to forget all your emotions now and sit here and see what you can do.

Mr. Sawyer has been the operator under the present circumstances, and he's been fair and decent in this matter. We are going to continue to be fair and decent to you.

I didn't send for you just to make a speech. I sent for you for action and, gentlemen, I want it.

MOTION FILED

Office - Supreme Court, U. S.

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Supreme Court of the United States

(OCTOBER TERM, 1951)

No. 744

YOUNGSTOWN SHEET AND TUBE CO. ET AL.,
Petitioners,

VERSUS

CHARLES SAWYER, Secretary of Commerce,
Respondent.

No. 745

CHARLES S. SAWYER, Secretary of Commerce,
Petitioner,

VERSUS

YOUNGSTOWN SHEET AND TUBE CO. ET AL.,
Respondents.

**MOTION FOR LEAVE TO FILE A BRIEF AMICUS
CURIAE AND BRIEF AMICUS CURIAE ON BE-
HALF OF AMERICAN LEGION POST NO. 88,
PLEDGER-ALLEN, NORMAN, OKLAHOMA**

PAUL W. UPDEGRAFF,

*Counsel for American Legion Post No. 88,
Pledger-Allen, Norman, Oklahoma.*

INDEX

	PAGE
— SUBJECT INDEX —	
Motion for Leave to File Brief as Amicus Curiae.....	1
Brief Amicus Curiae	3
Proposition: The President of the United States as Commander in Chief of the Army and Navy Has the Implied Power to Seize the Steel Mills During the Time of War	3
Conclusion	4

AUTHORITIES

U. S. v. Switchmen's Union of N. America; 97 Fed. Supp. 97	3
Art. VI, Sec. II, Constitution	4

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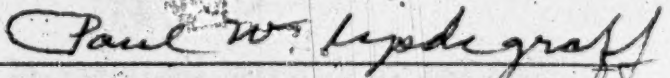
**MOTION FOR LEAVE TO FILE BRIEF
AS AMICUS CURIAE**

To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:

Comes now American Legion Post 88, Pledger-Allen,
Norman, Oklahoma, and respectfully moves this Court
pursuant to Rule 27, paragraph 9, of the Rules of this

Court, for leave to file the accompanying brief in this case *amicus curiae*. The consent of the attorney for the petitioners, was requested but has not been received. The interest of American Legion Post No. 88, Pledger-Allen, Norman, Oklahoma, is that the issue is a great public question. It is especially important at the present time, because the future of the nation and even its survival may depend upon the decision reached by the Court in this case.

Respectfully submitted,



Counsel for American Legion Post No. 88,
Pledger-Allen, Norman, Oklahoma.

May 4, 1952.

BRIEF AMICUS CURIAE

We shall raise in this brief only the following point:

The President of the United States as Commander in Chief of the Army and Navy has the implied power to seize the steel mills during the time of war.

This Court will take judicial knowledge of the fact that the United States is engaged in "a shooting war" in Korea. *United States v. Switchmen's Union of N. America*, 97 Fed. Supp. 97.

The United States as a signatory of the United Nations is engaged in a war which needs no formal declaration of war by the Congress of the United States. The treaty of the United Nations has the effect of law. Art. VI, Sec. 2, Constitution. As Commander in Chief of the Army and Navy the President ordered our troops to resist the invasion of South Korea by the Northern Koreans and the Chinese Reds. Since June, 1950, the United States has been engaged in a war in Korea "in fact."

As Commander in Chief the President has the obligation and duty to his men on the field of battle to see that they have an uninterrupted flow of steel with which to wage war. To do less would constitute desertion of his forces on the field of battle in the face of the enemy.

Time of crisis changes the authority of the President. He has no authority to proclaim a crisis if in fact crisis does not exist; however, this Court will take judicial knowledge, as in the past, of depressions, stock market crashes, wars, and "emergencies."

The argument is not valid that the present crisis was caused by the failure of the President to invoke the Taft-Hartley Act. The courts will not substitute their judgment in carrying out the laws by the executive branch and must be governed by the acts and decisions of the political department of the government.

CONCLUSION

The President has the implied power to keep the steel mills open. To do this he ordered them seized. Because of the "crisis" the order is valid. We urge on behalf of the men in Korea and those about to be sent to Korea and on behalf of the millions of men who fought and suffered and died there that the authority of the Commander in Chief be sustained for the reasons set forth herein.

Respectfully submitted,

AMERICAN LEGION POST No. 88,
NORMAN, OKLAHOMA,

PAUL W. UPDEGRAFF.